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28906

No. 136

COURT OF APPEALS

STATE OF NEW YORK

In the Matter of the Application for a Review under Article 13 of the Tax Law of a Tax Assessment by

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,

Petitioner-Appellant

against

THE BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK, and THE TOWN OF RIVERHEAD a party by operation of law,

Respondents

RECORD ON APPEAL

CAHILL, GORDON, REINDEL & OHL,
Attorneys for Petitioner-Appellant,
63 Wall Street,
Borough of Manhattan,
New York 5, New York
WH 4-7400

REGINALD C. SMITH,
Attorney for Respondents,
No. 137 West Main Street,
Riverhead, New York
PA 7-4100

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NEW YORK SUPREME COURT

APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of the Application for a Review under Article 13 of the Tax Law of a Tax Assessment by

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
Petitioner-Respondent,

against

THE BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK,
Respondents-Appellants.

Statement Under Rule 234.

This proceeding was commenced by the service of a notice and annexed petition upon the Respondents on the 9th day of September, 1955. No answer has been served. Notice of motion to dismiss pursuant to Rule 106 of the Rules of Civil Practice was served on September 21, 1955. The names of the original parties in full are as given above. By operation of law the Town of Riverhead automatically became a party to this proceeding on or about December 1, 1955.

Common School Districts numbered 1 and 2 of the Town of Riverhead became a party *amici curiae* with the permission of the Court on the 21st day of October, 1955, and appeared herein by EDWIN S. LAPHAM, ESQ., their attorney, of 220 Roanoke Avenue, Riverhead, New York.

Common School District numbered 4 of the Town of Riverhead became a party *amicus curiae*

with the permission of the Court on the 21st day of October, 1955, and appeared herein by HORACE A. DEMAREST, JR., ESQ., its attorney, of 306 Roanoke Avenue, Riverhead, New York.

Except as hereinbefore stated, there has been no change in the parties or the attorneys.

Notice of Appeal

SUPREME COURT

SUFFOLK COUNTY

In the Matter of the Application for a Review under Article 13 of the Tax Law of a Tax Assessment by

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
Petitioner,

against

THE BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK,
Respondents.

PLEASE TAKE NOTICE that the Board of Assessors of the Town of Riverhead, New York, and the Town of Riverhead, hereby appeal to the Appellate Division of the Supreme Court for the Second Judicial Department from the final order of the Supreme Court, Suffolk County, dated the 4th day of January, 1956, and filed in the Office of the County Clerk of Suffolk County on the 9th day of January, 1956, which order denied

the Respondents' motion to dismiss the petition and which directed that the Respondents and all tax officials having jurisdiction of the subject-matter strike from the assessment roll of the Town of Riverhead for the year 1955-56 the assessments of the Petitioner, GRUMMAN AIRCRAFT ENGINEERING CORPORATION, and these Respondents do appeal from each and every part of said order as well as from the whole thereof.

Dated: January 9th, 1956.

Yours, etc., 8

REGINALD C. SMITH
Attorney for Respondents,
Office and Post Office Address,
137 West Main Street,
Riverhead, New York.

To:

CHARLES KINGSLEY, ESQ.,
Attorney for Petitioner,
South Oyster Bay Road,
Bethpage, New York.

9

EDWIN S. LAPHAM, ESQ.,
Attorney for Common School
Districts Numbers 1 and 2,
Town of Riverhead, Amici Curiae,
220 Roanoke Avenue,
Riverhead, New York.

HORACE A. DEMAREST, JR., ESQ.,
Attorney for Common School Distric'
No. 4, Town of Riverhead, Amicus Curiae,
306 Roanoke Avenue,
Riverhead, New York.

10 **Notice Under Article 13 of Tax Law**

SUPREME COURT

COUNTY OF SUFFOLK

[SAME TITLE]

PLEASE TAKE NOTICE, that upon the petition of Grumman Aircraft Engineering Corporation duly verified the 9th day of September, 1955, a copy of
11 which is hereto annexed, an application will be made at a Special Term of the Supreme Court, to be held at the Suffolk County Court House, Griffing Avenue, Riverhead, New York, on the 11th day of October, 1955, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for the review under Article 13 of the Tax Law of the State of New York of the assessments against the petitioner appearing on the 1955-56 assessment roll, Town of Riverhead, New York, and affecting real property owned by the United States of America and leased to and occupied by petitioner, which property is situated
12 in the Town of Riverhead, New York, as more particularly described in the annexed petition, and for such other and further relief as to the Court may seem just and proper.

Dated, September 9th, 1955.

Yours, etc.,

CHARLES KINGSLEY, ESQ.
Attorney for Petitioner
Office and Post Office Address:
South Oyster Bay Road
Bethpage, New York

Petition 13

To:

THE CLERK OF THE TOWN OF
RIVERHEAD, New York

THE CLERK OR A TRUSTEE OF
SCHOOL DISTRICT #1,
Calverton, New York

THE CLERK OR A TRUSTEE OF
SCHOOL DISTRICT #2,
Calverton, New York

THE CLERK OR A TRUSTEE OF 14
SCHOOL DISTRICT #4,
Calverton, New York

Petition

SUPREME COURT

COUNTY OF SUFFOLK

[SAME TITLE] 15

TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF SUFFOLK:

The petition of Grumman Aircraft Engineering Corporation respectfully shows:

1. Your petitioner is a corporation organized and existing under the laws of the State of New York and has its principal office and place of busi-

16 *Petition*

ness at South Oyster Bay Road, Bethpage, Nassau County, New York.

2. Upon information and belief, that at the times hereinafter mentioned, the respondent, The Board of Assessors of the Town of Riverhead, New York, was charged with the duty of determining the taxable status, the valuing and assessing of real property situated in the Town of Riverhead for town, county, school and state tax purposes.

3. The United States Government is now and
17 was during all the times hereinafter mentioned the owner of certain real property situated in the Town of Riverhead, described on the assessment roll of the Town of Riverhead for the year 1955-56 as follows:

"Grumman Aircraft Engineering Corp.
Calverton, New York

1 T 15 16 20 41

N—Parker Road and Airport north line
E—Parker Road
S—School District No. 2
W—Airport west line"

18

"Grumman Aircraft Engineering Corp.
Calverton, New York

2 T 15 16 23 45

N—Scl. Dist. 1, Mdl. Cy. Rd. & Scl. Dist. 4
E—Airpt east line and Scl. Dist. 4 and, in part, by Line Rd.
S—Peconic River, Airpt so. line, Swan Pond Rd & Wading River Rd.
W—Wading River Rd. & Airpt west line."

"GRUMMAN AIRCRAFT ENGINEERING CORP.
CALVERTON, NEW YORK

4 T 15 16 20 50

N—Mdl. Cy. Rd. & Airpt north line
E—Airport east line
S—Peconic River
W—School District No. 2"

4. That title to said real property was acquired by the United States of America through eminent domain proceedings instituted in the United States 20
District Court for the Eastern District of New York entitled, "United States of America, Petitioner-Plaintiff, versus 4,475.23 acres of land etc., Defendants (Civil Action No. C. P. 84)" and said title has been held by the United States of America since the filing of a Declaration of Taking in said proceeding on or about May 8, 1952.

5. Petitioner is now and was during all the times hereinafter mentioned the lessee and occupant of the above described real property owned by the United States Government by virtue and under the authority of a lease agreement with the 21
United States Government dated April 1, 1954 and designated Contract NOa 5682, a copy of which, marked "Exhibit A" is attached hereto and made a part hereof.

6. That prior to June 1st, 1955, said Board of Assessors prepared and completed an assessment roll for the Town of Riverhead and caused to be published due notice of completion thereof and that the same might be seen and examined at the office of said Board during the month of June 1955.

7. That an alleged taxable interest in the said real property leased and occupied by the petitioner was tentatively assessed against your petitioner on said assessment roll for the year 1955-56 for said Town of Riverhead, as follows:

"GRUMMAN AIRCRAFT ENGINEERING CORP.
CALVERTON, NEW YORK

1 T 15 16 20 41

N—Parker Road and Airport north line.
23 E—Parker Road
S—School District No. 2
W—Airport west line

100/4475 interest under contract with U. S. of 4/1/54

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total $17,000

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24 "ASSESSMENT OF PROPERTY OMITTED FROM THE 1954 ASSESSMENT ROLL AND ASSESSED THIS YEAR PURSUANT TO THE PROVISIONS OF SECTION 24 OF THE TAX LAW

GRUMMAN AIRCRAFT ENGINEERING CORP.
CALVERTON, NEW YORK

1 T 15 16 20 41

N—Parker Road and Airport North line
E—Parker Road
S—School District No. 2
W—Airport west line

100/4475 interest under contract with U. S. of 4/1/54

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total $11,400

GRUMMAN AIRCRAFT ENGINEERING CORP.
CALVERTON, NEW YORK

2 T 15 16 23 45 26

N—School Dist. 1, Mdl Cy. Rd. & Scl. Dist. 4
E—Airpt east line and Scl. Dist. 4 and, in part by Line Rd.
S—Peconic River Airpt. so. line, Swan Pond Rd. & Wading River Rd.
W—Wading River Rd & Airpt west line

3635/4475 interest under contract with U. S. of 4/1/54

The interest of the United States or of this State in the foregoing property is not assessed or taxed. 27

Total $631,300

28 *Petition*

"Assessment of Property Omitted from the 1954 Assessment Roll and Assessed this Year Pursuant to the Provisions of Section 24 of the Tax Law.

Grumman Aircraft Engineering Corp.
Calverton, New York

2 T 15 16 23 45

N—Scl. Dist. 1, Mdl. Cy. Rd. & Scl. Dist. 4
E—Airpt east line and Scl. Dist. 4 and, in
29 part, by Line Rd.
S—Peconic River, Airpt so. line, Swan Pond Rd. & Wading River Rd.
W—Wading River Rd. & Airpt west line.

3635 4475 interest under contract with U. S. of 4/1/54

The interest of the United States, or of this State in the foregoing property is not assessed or taxed.

Total $421,400

30 Grumman Aircraft Engineering Corp.
Calverton, New York

4 T 15 16 20 50

N—Mdl. Cy. Rd. & Airpt north line
E—Airport east line
S—Peconic River
W—School District No. 2

540 4475 interest under contract of 4/1/54 with U. S.

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total **$94,800**

ASSESSMENT OF PROPERTY OMITTED FROM THE 1954 ASSESSMENT ROLL AND ASSESSED THIS YEAR PURSUANT TO THE PROVISIONS OF SECTION 24 OF THE TAX LAW

GRUMMAN AIRCRAFT ENGINEERING CORP.
CALVERTON, NEW YORK

4 T 15 16 20 50

N—Mdl. Cy. Rd. & Airpt north line
E—Airport east line
S—Peconic River
W—School District No. 2

540 4475 interest under contract of 4/1/54 with U. S.

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total ..... $63,200"

8. That said assessments were made by the Board of Assessors on the erroneous assumption that petitioner has an interest in said real property assessable and taxable under Article I, Section 4, Subdivision 17 of the Tax Law of the State of New York which provides in part as follows:

"Whenever the legal title of real property is in the United States or in this State, but the use, occupation or possession thereof is in a corporation, association, co-partnership or individual, or its or his successor in interest, under a contract of sale or other agreement whereby upon certain payment or payments the legal title is to be or may be acquired by such corporation, association, co-partner-

ship or individual, his or its interest in such real property shall be assessed and taxed as real property subject to the provisions of this subdivision."

9. That the aforesaid lease between petitioner and the United States of America is the only agreement or contract between the Government of the United States and petitioner relating to the aforesaid property and said lease is not a contract of sale or other agreement within the
35 provisions of Article I, Section 4, Subdivision 17 of the Tax Law, and your petitioner does not have the use, occupation or possession of said real property under a contract of sale or other agreement whereby upon certain payment or payments the legal title is to be or may be acquired by petitioner.

10. That your petitioner, deeming itself aggrieved by said assessments duly made application in writing to said Board of Assessors on or before the third Tuesday in July, 1955, protesting said assessments on the grounds that the
36 same were illegal, erroneous and void because the petitioner does not have an interest in the said real property subject to assessment and tax within the provisions of the Tax Law of the State of New York and on the ground that said assessments were an indirect attempt to tax real property owned by the United States of America which is specifically exempt from tax under the provisions of the Tax Law of the State of New York, Article I, Section 4, and the Constitution of the United States. Your petitioner demanded that said assessments be struck from the rolls and the premises be listed as exempt. A copy of said ap-

plication is hereto annexed, marked Exhibit B and made a part hereof.

11. That the said Board of Assessors received said application but has neglected and refused to strike said assessments from the rolls and list said property as exempt.

12. That on or before the 1st day of September 1955 the Board of Assessors finally completed, signed and verified said assessment roll, as your petitioner is informed and believes, leaving thereupon the assessments against your petitioner, as 38
shown in paragraph 7 herein, totaling the sum of $1,239,100.00, and filed said roll in the office of the Town Clerk of the Town of Riverhead and posted notice as provided by law.

13. That thirty days have not elapsed since such completion, verification and filing thereof.

14. That the assessments against this petitioner described in paragraph 6 herein are illegal, erroneous and void and therefor excessive on ground that this petitioner does not have any interest in said real property subject to assess- 39
ment and tax within the provisions of the Tax Law of the State of New York, Article I, Section 4, Subdivision 17, or any other provision of the Tax Law; on the ground that the assessments are against real property owned by the United States of America which is specifically exempt from tax under the provisions of the Tax Law of the State of New York, Article I, Section 4, and the Constitution of the United States; on the ground that they are illegal and void, being an indirect assessment and tax on real property of the United States of America, which is specifically exempt from tax by law as aforesaid.

40 *Petition*

15. That no previous application for the relief demanded herein has been made to any Court or Judge.

WHEREFORE, your petitioner prays that all and singular the proceedings, decisions and actions of said Board of Assessors had and made in the premises be reviewed and corrected; that said assessments be declared illegal, erroneous and void and that said Assessors be ordered and directed to strike said assessments against your petitioner from the rolls and that the said
41 premises be shown on said rolls as exempt property; and that your petitioner have such other and further relief as to this Court may seem just, together with the costs and disbursements of this proceeding.

Dated, September 9th, 1955.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,

Petitioner,

By /s/ E. CLINTON TOWL
Administrative Vice President

42

CHARLES KINGSLEY, ESQ.
Attorney for Petitioner
South Oyster Bay Road
Bethpage, New York

(Verified Sept. 9, 1955.)

Exhibit A, Annexed to Petition

Aer-CO-JHM:rw 26 August 1954

Contract NOa 5682

Supplemental Facilities Agreement

THIS NEGOTIATED AGREEMENT, made as of the first day of April, 1954, between the UNITED STATES OF AMERICA (hereinafter called the "Government"), represented by the Contracting Officer executing this contract, and GRUMMAN AIRCRAFT ENGINEERING CORPORATION, a corporation organized and existing under the laws of the State of New York, whose address is Bethpage, Long Island, New York (hereinafter called the "Lessee"),

WITNESSETH:

WHEREAS, the Government and the Lessee have heretofore executed a Facilities Contract NOa-1151, dated 23 January 1952; and

WHEREAS, such Facilities Contract provided for the acquisition of certain machine tools and equipment and the construction of an Assembly Plant, together with supporting facilities; and

WHEREAS, the Secretary of the Navy (hereinafter called the "Secretary") has determined that the Plant and supporting facilities (hereinafter described and referred to as the "Facilities") are not excess to the needs of the Department of the Navy (hereinafter called the "Department") but are not, for the time being, required for public use; and

WHEREAS, the Facilities are required by the Lessee for use in performing contracts for the Government; and

46 *Exhibit A, Annexed to Petition*

WHEREAS, the Secretary has determined that it will promote the national defense and will be in the public interest to lease the Facilities to the Lessee upon the terms and conditions hereinafter set forth; and

WHEREAS, this Agreement is made under the authority of and in accordance with the provisions of the Act approved August 5, 1947 (34 U. S. C. 522a); the Act approved July 17, 1953 (50 U. S. C. App. 1173-5); and Title II of the First War Powers Act, 1941, (50 U. S. C. App. 611), as amended
47 and extended; and

WHEREAS, this Agreement has been approved by the Armed Services Committees of the Congress in accordance with the Act approved September 28, 1951 (40 U. S. C. 551 et seq.).

NOW, THEREFORE, in consideration of the premises and of the terms, covenants and conditions hereinafter set forth, the parties hereto do hereby agree as follows:

ARTICLE I—LEASED PROPERTY

48

(a) The Government does hereby lease, rent and demise to the Lessee and the Lessee does hereby hire and rent from the Government the following described property (hereinafter called the "Facilities");

> The Naval Industrial Reserve Aircraft Plant, D. O. D. No. 466 situated in the Towns of Riverhead and Brookhaven, near Calverton in Suffolk County, Long Island, New York, including all land owned or controlled by the Government and all runways, taxiways,

aprons, plants, buildings, building installations, structures, utilities, improvements and appurtenances located upon said land or forming a part of the land, installations or rights, including easements affecting or necessary for the use of said land or portions thereof, condemned, purchased, acquired or constructed for use in connection with and as a part of said Naval Industrial Reserve Aircraft Plant; all as more specifically shown and delineated by the property line shown on Plot Plan PR 4, dated April 1, 1954, attached hereto as Exhibit "A", which by this reference is incorporated herein and made a part hereof. 50

(b) In order to protect the aerial approaches to the demised premises, the Government may acquire easements, fees or other interests in land adjacent to or in the vicinity of the demised premises as may be appropriate to accomplish such purposes. It is contemplated by the parties hereto that, in the event the Government does acquire any such land or any such interests therein, this agreement will be amended to include such additional property, or interests therein, as part of the demised premises without additional consideration to the Government. 51

ARTICLE II—TERM

The term of this lease shall be for a period of five years, commencing on the first day of April 1954, and ending on the 31st day of March 1959, unless sooner terminated as herein provided. Upon the expiration of said term by lapse of time, Lessee shall have the option to renew or extend this lease upon the same terms and conditions as

herein set forth, for two successive periods of five (5) years each, subject, however, to the following:

(a) Lessee shall exercise its option by giving the Government notice of its intention to renew or extend said lease which said notice shall be given not more than one year and not less than six months prior to the expiration of the original term hereof and prior to the expiration of the first five-year renewal hereof.

(b) The rental to be paid by Lessee for any renewed or extended term shall, at the option of the Government, be subject to renegotiation prior to the commencement of any such renewed or extended term.

ARTICLE III—USE

The Lessee shall have the right to use the Facilities for the following purposes:

For all general industrial purposes, including but not limited to, the production, assembly, overhaul, maintenance, servicing or flight testing of all types of aircraft and missiles, including engines, components, accessories and parts therefor; for commercial air operation; and for such other purposes as the Contracting Officer may, from time to time, approve in writing: *provided, however*, that Lessee shall at all times devote so much of said Facilities to the performance of contracts for the Department as the Contracting Officer shall from time to time deem reasonable and necessary for the performance of such contracts; and *provided, further*, that at no time shall Lessee use said Facilities for such purposes or in such a manner as to impair materially the mobilization production capacity of said Facilities.

ARTICLE IV—RENT

(a) Subject to the provisions of paragraph (b) of Article II hereof and of paragraph (d) of this Article IV, the Lessee shall pay, as annual rental for the Facilities the sum of $2,800,000 or the total of the following, whichever is the lesser:

(i) $250,000 (hereinafter called "minimum rental") plus

(ii) The sum obtained by multiplying by twenty-two cents (22¢) the total manhours, as hereinafter defined, in excess of 2,045,500 worked during each lease year (hereinafter called "additional rental"). 56

(b) The rental reserved herein shall be paid in the following manner:

(i) The minimum rental shall be paid in quarterly installments, in advance, commencing on the first day of April, 1954.

(ii) The additional rental, if any, shall be paid quarterly on or before the thirtieth day of the month following the end of each quarter and shall be computed on all manhours worked during said preceding quarter in excess of 511,375; *provided, however*, that at the end of each lease year, or at the time this lease is terminated in accordance with Article VII or VIII hereof, Lessee shall be entitled to a credit on the minimum rental for the following lease year (or in the event of termination a credit on the minimum rental for the current year) in an amount equal to any additional rental paid which is in excess of the sum specified in paragraph (a) hereof. 57

58 *Exhibit A. Annexed to Petition*

(c) The term "manhours", as used herein, shall mean the total manhours worked by all those employees (i) regularly assigned to the Facilities by the Lessee and (ii) regularly assigned to the Facilities by sublessees hereunder, if any.

(d) Not less than thirty days prior to the expiration of (i) the second year of the initial term hereof and (ii) the second year of any renewed or extended term hereof, the parties hereto agree to meet for the purpose of determining whether
59 the introduction of an automaton or other advanced machining processes or the presence of any other factors has vitiated the validity of the basis used for determining additional rental as set forth in subparagraph (ii) of paragraph (a) hereof. In the event that the parties hereto agree that said basis for determining additional rental has been so vitiated, this lease shall be amended to establish a new basis for determining additional rental for the last three years of such initial or renewed or extended term: *provided, however*, that in the event the parties hereto are unable to agree within 60 days of the commencement of the third
60 year of the initial or renewed or extended term, on whether said basis for determining additional rental has been vitiated or on a new basis for determination of additional rental, then such disagreement shall be considered a dispute concerning a question of fact arising under this lease and shall be settled in accordance with paragraph (f) of Article XVI hereof.

ARTICLE V—MAINTENANCE

The Lessee shall protect, preserve, maintain and repair the Facilities in accordance with sound industrial practice and as the Department may from

time to time require and direct. Upon the expiration or earlier termination of this lease, the Lessee agrees to surrender the Facilities peaceably to the Government in as good condition as when received; reasonable wear and tear excepted.

ARTICLE VI—INSURANCE

(a) All risk of loss of or damage to the Facilities during the term of this lease, whether or not caused by the failure of the Lessee to exercise due diligence in complying with the provisions 62
hereof, shall be borne by the Lessee and the Lessee shall upon demand and, at the election of the Department, either compensate the Government in full for any such loss or damage or rebuild, replace or repair any item of the Facilities so lost or damaged: *Provided, however*, that the Lessee shall be liable for loss of or damage to the Facilities resulting from risks expressly required to be insured hereunder only to the extent of insurance so required to be procured and maintained or to the extent of insurance actually procured and maintained, whichever shall be the greater, and *Provided further*, that the Lessee shall not be 63
liable for loss of or damage to the Facilities arising from causes beyond the control of the Lessee and not customarily covered by insurance in the locality in which the Facilities are situated.

(b) The Lessee shall procure and maintain at its expense, which expense Lessee covenants and agrees will not be charged either directly or indirectly into the cost or price of any work performed, either directly or indirectly, for the Government, the following property damage insurance, in amounts and types which may exceed but

shall not be less than the minimum amounts and types hereinafter specified:

Type	*Amount*
(i) Fire and Extended Coverage, including strikes, riots, civil commotion, vandalism and malicious mischief	$13,000,000.00
(ii) Boiler and Explosion Coverage	$ 500,000.00

65 The obligation to insure the Facilities under this paragraph shall not commence until acceptance of the Facilities under Contract NOa-1151 or until such time as the subcontractors under Contract NOa-1151 are no longer responsible for loss of or damage to the Facilities, whichever first occurs.

(c) The Lessee shall procure and maintain, with respect to its use or maintenance of the Facilities, workmen's compensation, employer's liability and bodily injury insurance and third party property damage insurance in such amounts as shall be reasonable to cover the risks both of the Government and of the Lessee or in such amounts as the 66 Department may otherwise direct under paragraph (d) hereof.

(d) Except as otherwise specifically provided herein, all insurance required by this lease to be carried by the Lessee on the Facilities shall be in such form, for such amounts, for such periods of time, and with such insurers as the Department may from time to time reasonably require or approve, which approval may permit the Lessee to be a self-insurer in appropriate circumstances, and shall contain provision for thirty (30) days' prior notice to the Office of Naval Material. In

surance Branch, Washington 25, D. C., in the event of cancellation of the policy on the part of the insurer. A certificate of insurance or a certified copy of each policy of insurance taken out hereunder shall be deposited promptly with said Insurance Branch. The Lessee agrees that, not less than thirty (30) days prior to the expiration of any insurance required by this contract to be carried by the Lessee on the Facilities, it will deliver to said Insurance Branch a certificate of insurance or a certified copy of each renewal policy to cover the same risks. All insurance 68
required or carried by the Lessee on any of the Facilities shall be for the protection of the Government and the Lessee against their respective risks and liabilities in connection with the Facilities. Each such policy of insurance shall name the Lessee and the United States of America (Department of the Navy) as the insured and shall contain a loss payable clause reading substantially as follows: "Loss, if any, under this policy shall be adjusted with Grumman Aircraft Engineering Corporation and the proceeds, at the direction of the Government, shall be payable 69
to Grumman Aircraft Engineering Corporation; and proceeds not paid to Grumman Aircraft Engineering Corporation shall be payable to the Treasurer of the United States of America." Each policy of insurance covering workmen's compensation, employer's liability and bodily injury and third party property damage shall contain an endorsement reading substantially as follows: "The insurer waives any right of subrogation against the United States of America which might arise by reason of any payment under this policy."

(e) In the event that any item or part of the Facilities shall require repair, rebuilding or replacement resulting from loss or damage the risk of which is required to be covered by insurance hereunder, the Lessee shall promptly give notice thereof to the Department. If the proceeds of any insurance covering such loss or damage are sufficient to permit the completion of such repair, rebuilding or replacement, the Lessee shall effect such repair, rebuilding or replacement. If the proceeds of any insurance covering such loss or
71 damage are not sufficient to permit the completion of such repair, rebuilding or replacement, the Lessee shall effect such repair, rebuilding or replacement if required so to do by the Department and the excess of the cost of such repair, rebuilding or replacement over such insurance proceeds as are available shall be reimbursed to the Lessee. In the event that the Lessee shall have effected any repair, rebuilding or replacement which the Lessee is required to effect pursuant to this paragraph, the Contracting Officer shall direct the payment to the Lessee of so much of the proceeds of any insurance carried by the Lessee and made
72 available to the Government on account of loss of or damage to any item or part of the Facilities as may be necessary to enable the Lessee to effect such repair, rebuilding or replacement. In the event that the Lessee shall not have been required to effect such repair, rebuilding or replacement, and if the insurance proceeds allocable to the loss or damage which has created the needs for such repair, rebuilding or replacement have been paid to the Lessee, the Lessee shall promptly refund to the Government the amount of such proceeds.

Exhibit A. Annexed to Petition 73

ARTICLE VII—TERMINATION

This lease may be terminated by the Department at any time prior to the expiration of the term hereof:

(a) During any national emergency declared by the President or Congress;

(b) Upon ninety (90) days written notice to the Lessee whenever the Secretary shall determine that the interests of the national defense so require;

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(c) Upon ten (10) days written notice to the Lessee if the Lessee shall have defaulted in the performance of any of its obligations hereunder and shall not have cured such default within sixty (60) days after receipt of a notice from the Department specifying such default, or in the event of the filing of a petition by or against the Lessee for adjudication as a bankrupt, for reorganization or for arrangement within the meaning of the Bankruptcy Act as now or hereafter amended, or in the event of the appointment of a receiver or trustee of the property of the Lessee. In the event of termination under this paragraph (c), the Department shall have the immediate right to re-enter and resume possession of the Facilities and to remove all persons and property therefrom and such re-entry shall not be deemed an acceptance of a surrender of this lease. In the event of such termination, the Department may at its election re-let the whole or any portion of the Facilities for any period, equal to, greater than, or less than the remainder of the term of this lease, to any person, for any sum and upon any terms deemed by the Department to be reasonable and satisfactory.

75

76 In the event of termination under this paragraph (c) and whether or not the Facilities shall have been re-let, the Department shall be entitled to recover and the Lessee shall pay to the Government (i) the cost to it of resuming possession of the Facilities, (ii) the cost to it of restoring, renovating, replacing or repairing all or any part of the Facilities to their condition at the inception of this lease, reasonable wear and tear excepted, (iii) the cost to it of performing any other covenant on the part of the Lessee to be performed
77 hereunder, and (iv) an amount equal to the aggregate of all rent reserved hereunder and not theretofore paid, less the net rent, if any, collected by the Government on re-letting the demised premises, which amounts shall be due and payable by the Lessee at the times on which the rent reserved under this lease would have become due and payable; that is to say, the Lessee shall pay to the Government quarterly during the remaining period of the original term of this lease the deficiency then existing. At its election and in lieu of terminating this lease pursuant to this paragraph (c), the Department may perform or cause
78 said defaulted obligations to be performed for the account and at the expense of the Lessee, in which event the Lessee shall pay to the Government the cost to the Government of performing or causing said obligations to be performed.

(d) Upon ninety (90) days written notice to the Lessee that the Secretary has determined that the Facilities, or the major portion thereof, are excess to the further needs and responsibilities of the Department; *provided, however*, that if, within such ninety (90) day period, the Lessee shall notify the Department of its intention to exercise

the right to purchase the Facilities as provided in Article X hereof, termination of this lease pursuant to this paragraph (d) shall not become effective unless and until the Department shall have obtained all necessary authorizations and approvals required to effectuate such sale to the Lessee and shall have notified Lessee that it has obtained such necessary authorizations and approvals.

ARTICLE VIII—TERMINATION BY LESSEE

80 (a) This lease may be terminated by the Lessee at any time prior to the expiration of the term granted hereunder or prior to the expiration of any extension thereof upon thirty (30) days written notice to the Department in the event of damage to or destruction of all or a substantial part of the Facilities so as to render all the Facilities incapable of use for the purposes for which they are leased hereunder, *Provided* (i) such damage or destruction is occasioned by a risk not in fact covered and not customarily covered by insurance in the locality in which the Facilities are located or by a risk which is covered by insurance and the 81 Department either has not authorized or directed the repair, rebuilding or replacement of the Facilities or does not make provision for payment for such repair, rebuilding or replacement by the application of insurance proceeds or otherwise, and (ii) such damage or destruction is not occasioned by the fault or negligence of the Lessee or by any failure or refusal on its part fully to comply with its obligations hereunder.

(b) This lease may also be terminated by the Lessee at any time prior to the expiration of the term granted hereunder or prior to the expiration

of any extension thereof upon one hundred eighty (180) days written notice to the Department and certification by the Lessee that the total manhours (as defined in Article IV hereof) worked at the Facilities in the last preceding quarter or expected to be worked at the Facilities during the current quarter, did not or will not exceed 300,000 hours. In the event of such termination, Lessee agrees to perform all obligations incurred by it prior to the effective date of termination, and the Department shall have the right to re-enter and resume
83 possession of the Facilities on the effective date of termination.

ARTICLE IX—TAXATION

In the event that as a result of any future Act of Congress subjecting Government owned property to taxation, taxes, assessments, or similar charges are imposed by state or local authorities upon the property leased hereunder, (other than upon the Lessee's possessory interest therein), the Lessee shall; (a) notify the Government of the imposition of such taxes, assessments or similar charges im-
84 mediately, and (b) pay the same when due and payable unless otherwise directed in writing by the Contracting Officer. Upon the payment of any such taxes, assessments or similar charges, this lease shall be renegotiated so as to accomplish an equitable reduction in the rental herein provided, which reduction shall not be greater than the amount of such taxes, assessments or similar charges: Provided, that, in the event the parties hereto are unable to agree within 90 days from the date of the payment of such taxes, assessments or similar charges, on the amount of such reduction, then such disagreement shall be considered to be

a dispute concerning a question of fact arising under this lease and shall be settled in accordance with paragraph (f) of Article XVI hereof.

ARTICLE X—IMPROVEMENTS, MOBILIZATION AND OPTION TO PURCHASE

(a) In the event that the Facilities are determined to be excess to the further needs and responsibilities of the Department, and the Department elects to terminate this lease in accordance with the provision of paragraph (d) of Article VII hereof, the Lessee shall have an option, 86
which may be exercised by notice of intention to purchase delivered to the Department at any time during a period of ninety (90) days after receipt of notice of termination, to purchase the Facilities at their original cost to the Government less depreciation on improvements (exclusive of improvements financed by Lessee) at the rate of 3% per annum from the date of completion of the Facilities to the date notice of Lessee's intention to exercise such option is received by the Government. Sale of the facilities to the Lessee shall, however, be subject to the Department obtaining 87
all necessary authorizations and approvals required to enable it to sell the Facilities to the Lessee.

(b) In the event Lessee purchases the Facilities in accordance with paragraph (a) hereof, the Lessee hereby covenants and agrees that, for a period of twenty (20) years from the date of the deed which effects a transfer of said Facilities to the Lessee, it will maintain said Facilities in such condition that they will at all times be capable of producing military aircraft for the Department within thirty (30) days after receipt by Lessee of

a mobilization notice from the Department; and Lessee further agrees that such covenant may, at the option of the Department, be made a part of the deed of conveyance from the Government.

(c) The Lessee hereby covenants and agrees that, subject to and in accordance with the provisions of Article XI hereof, it will, within five (5) years from the date hereof, expend not less than $1,000,000 for the construction of additional buildings, structures or other improvements to the Facilities. In the event that this lease is terminated by either party prior to the expiration of
89 the first five year term hereof, then the provisions of this paragraph (c) shall be of no force and effect; *provided, however*, that if this lease is terminated during the first term hereof and the Facilities are sold to the Lessee in accordance with the provisions of paragraph (a) of this Article and Lessee at the date of the sale has not expended $1,000,000 for the construction of additional buildings, structures or other improvements to the Facilities, then the deed of conveyance to Grumman Aircraft Engineering Corporation
90 shall contain a covenant on the part of Grumman Aircraft Engineering Corporation to carry out the provisions of this paragraph (c).

ARTICLE XI—ALTERATIONS AND REMOVAL

No major alterations, additions or betterments shall be made to any property included among the Facilities without the prior written consent of the Bureau of Aeronautics, provided, however, the Lessee may make such minor additions or alterations as may be necessary to use the Facilities in accordance with the provisions of this Agreement. All alterations, additions and betterments which

may have been made by the Lessee shall become the property of the Government when annexed to any property included among the Facilities, except those items of personal property belonging to the Lessee which can be readily removed without injury to the Facilities. Such items shall be removed by the Lessee prior to the expiration or termination of this lease, except that in the event of termination by the Department for any cause upon less than ninety (90) days advance notice to the Lessee, the Lessee may remove such items for a period of sixty (60) days after the effective 92
termination of this lease. All property not so removed shall be deemed abandoned by the Lessee and may be used or disposed of by the Government in any manner whatsoever without liability or any obligation to account to the Lessee therefor. The Lessee shall not do or suffer anything to be done upon or in connection with the Facilities which may subject them or any part of them to any liens or rights *in rem* and shall promptly discharge or cause to be discharged any lien or right *in rem* of any kind other than one in favor of the Government which at any time shall arise or exist with respect to the Facilities or to any alterations, 93
additions or betterments thereto.

ARTICLE XII—REPRESENTATIONS

The Lessee has examined and knows the condition and state of repair of the Facilities as of the date first above written, accepts them as such and hereby acknowledges that the Government has made no agreement or promise to alter, improve, adapt or repair any of the Facilities or any part thereof during the term hereof. The Lessee acknowledges further that no representations con-

cerning the condition or state of repair of any item of the Facilities, or part thereof, have been made by the Government prior to or at the time of the execution of this lease which are not set forth herein and further that this lease contains all the agreements made between the parties hereto.

ARTICLE XIII—INDEMNIFICATION

The Lessee shall indemnify and save and hold harmless the Government, its officers, agents and
95 employees of and from any and all liability incurred as the result of any breach by the Lessee, its agents, servants, employees, invitees or licensees of any covenant or condition of this lease, or as the result of the Lessee's occupancy or use of the Facilities and whether or not occasioned by the negligence or lack of diligence of the Lessee, its agents, officers, servants or employees.

ARTICLE XIV—PRORATION

The rent reserved herein shall be prorated in the event of the commencement, expiration or
96 termination (other than for default) of this lease at any time other than the beginning of a calendar quarter.

ARTICLE XV—TRANSFER OF CONTRACT AND RIGHT TO SUBLEASE

This lease shall not be transferred or assigned by the Lessee, either voluntarily or by operation of law, except with the written consent of the Department. The Lessee may, however, from time to time sublease any part or portion of the Facilities which the Lessee does not for the time being require, provided the Lessee advises the Bureau

of Aeronautics in writing of all such proposed subleases at least thirty (30) days prior to execution thereof. The Lessee hereby agrees not to enter into any sublease to which the Bureau of Aeronautics does object during such thirty (30) days period. The Lessee further agrees that it will not sublet all or any portion of the demised premises for direct or indirect use by any other Federal Agency without prior written approval of the Bureau of Aeronautics.

ARTICLE XVI—GENERAL PROVISIONS 98

(a) *Recordation and Filing.* The Lessee shall take all necessary steps to put on public record evidence of such interest in the realty and personalty involved in this lease and any amendments thereof as the Government may have thereunder. The Lessee shall, for purposes of recordation and filing, duly execute and acknowledge counterparts of this lease, or summaries thereof, in such form and manner as may be necessary to insure compliance with the provisions of this paragraph (a). Recordation and filing shall be effected by the Lessee at its own expense promptly after the execution of this lease and notice thereof, including therein the place and date of filing, shall be given by the Lessee to the Contracting Officer within a reasonable time thereafter. 99

(b) *Failure of Government to Insist on Compliance.* The failure of the Government to insist, in any one or more instances, upon performance of any of the terms, covenants or conditions of this lease shall not be construed as a waiver or relinquishment of the Government's right to the future performance of any such terms, covenants or conditions and the Lessee's obligations in respect of

such future performance shall continue in full force and effect, and the receipt and acceptance of rent shall not be deemed to be a waiver of any breach or default by Lessee of any provision of this lease nor shall it invalidate or impair the efficacy of any termination or notice of termination hereunder unless expressly so agreed in writing by the Department.

(c) *Records.*

(i) The Lessee shall keep adequate records and books of account showing the actual cost of all items of labor, material, equipment, supplies, services and other direct expenditures made in performance of Lessee's obligations under Article X hereof and, in addition thereto, shall keep full, complete and accurate records of all manhours, as defined in Article IV hereof, worked by all employees of Lessee and its sub-lessees, if any. The method of accounting and record-keeping employed by the Lessee shall be subject to the approval of the Department, but no material change will be made therein if the same conforms to good accounting practices and is sufficient for the purposes of this lease.

(ii) The Department shall, at all reasonable times, be afforded proper facilities for inspecting the records and books of account pertaining to this lease and shall, at all reasonable times, have access thereto for such purposes. All information obtained from said records and books of account shall be deemed confidential.

(d) *Covenant against Contingent Fees.* The Lessee warrants that it has not employed any person to solicit or secure this lease upon any agreements for a commission, percentage, brokerage

or contingent fee. Breach of this warranty shall give the Government the right to annul this lease, or, in its discretion, to recover from the Lessee the amount of such commission, percentage, brokerage or contingent fee in addition to the consideration herein set forth. This warranty shall not apply to commissions payable by the Lessee upon contracts or sales secured or made through *bona fide* established commercial or selling agencies maintained by the Lessee for the purpose of securing business.

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(c) *Officials Not to Benefit.* No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this lease or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this lease if made with a corporation for its general benefit.

(f) *Disputes.* Except as otherwise provided herein, all disputes concerning a question of fact arising under this lease shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Lessee. Within thirty (30) days 105 from the date of receipt of such copy, the Lessee may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In

106 *Exhibit A, Annexed to Petition*

connection with any appeal proceeding under this clause, the Lessee shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Lessee shall proceed in accordance with the decision of the Contracting Officer.

(g) *Definition of "Department"*. "Department", as used in this lease shall mean the Secretary of the Navy, the Chief of the Bureau of Aeronautics, the Contracting Officer, and such other duly authorized representative or representatives
107 as the Secretary or the Chief of the Bureau of Aeronautics may designate from time to time.

(h) *Labor Provisions.*

(i) The Lessee shall not employ, in the performance of any work required to be performed under this lease, any person undergoing sentence of imprisonment at hard labor.

(ii) No laborer or mechanic doing any part of the work required to be performed under this lease, in the employ of the Lessee or any subcontractor contracting for any part of said work,
108 shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this subparagraph (ii). The wages of every laborer and mechanic employed by the Lessee or any subcontractor engaged in the performance of work required under this lease shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for

all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this subparagraph (ii) a penalty of Five Dollars ($5.00) shall be imposed upon the Lessee for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this subparagraph (ii), and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, 110 that this stipulation shall be subject in all respects to the exceptions and provisions of the Act of June 19, 1912 (U. S. Code, Title 40, Sections 324 and 325) relating to hours of labor, as modified by the provisions of Section 303 of Public Law No. 781, 76th Congress, approved September 9, 1940, relating to compensation for overtime; and

(iii) The Lessee, in performing the work required to be performed under this lease, shall not discriminate against any employee or applicant for employment because of race, creed, color or 111 national origin. All subcontracts made under this lease shall contain similar provisions. For the purpose of this Article, subcontracts shall be deemed to include all purchase orders and agreements to perform all or any part of the work, or to make or furnish any article required for the performance of work to be performed under this lease, except purchase orders or agreements for the furnishing of standard commercial articles or raw materials.

(i) *Notices.* No notice, order, direction, determination, requirement, consent or approval

under this lease shall be of any effect unless in writing.

(j) *Exhibits.* The Exhibits and Schedules attached hereto and all matters contained therein are hereby made a part of, and incorporated in, this lease.

ARTICLE XVII—SURVIVAL

This lease shall be binding upon the Lessee, its successors and assigns.

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ARTICLE XVIII—AGREEMENT OF USE SUPERSEDED

The provisions of Part II of Contract NOa-1151, dated 23 January 1952, between the Bureau of Aeronautics and Grumman Aircraft Engineering Corporation, insofar as they relate to the use of the Facilities by Grumman Aircraft Engineering Corporation, are, as of the date hereof, superseded by this Agreement.

IN WITNESS WHEREOF, the parties hereto have duly executed this lease as of the day and year first above written.

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UNITED STATES OF AMERICA

By /S/ D. M. WISEHAUPT
Contracting Officer
Bureau of Aeronautics
Department of the Navy

GRUMMAN AIRCRAFT ENGINEERING CORPORATION (Lessee)

/S/ L. A. SWIRBUL
Title: PRESIDENT

Exhibit A, Annexed to Petition 115

Contract NOa 5682

INSTRUCTIONS TO INSPECTORS

The Bureau of Aeronautics Representative, Bethpage, L. I., New York, has been assigned as the Naval Inspector having cognizance of this contract for technical inspection. Such inspector will conduct physical inspection at the place of manufacture, perform tests, and accept or reject the supplies or services being procured in accordance with the terms of the contract. Such inspector will also perform contract and security administration (when necessary) in connection with the contract and will certify invoices and vouchers as required by the terms of the contract. 116

NAVAER 2891A (New 8-52)

117

118

Exhibit B, Annexed to Petition

To the Board of Assessors of the Town of Riverhead, Suffolk County, New York:

Please Take Notice that Grumman Aircraft Engineering Corporation, having its principal office at South Oyster Bay Road, Bethpage, New York, hereinafter designated as the petitioner, occupying real property within the tax district comprising the Town of Riverhead, as a lessee of the United States of America, under the terms of a lease dated April 1st, 1954, designated as Con-
119 tract No. NOa-5682, a copy of which has been furnished to the Board of Assessors, objects to and protests the assessment of an asserted contract interest in said real property under the aforesaid contract, as set down in the assessment roll of the Town of Riverhead for the year 1955-56 and the assessment included in said roll of property said to have been omitted in the assessment roll for the year 1954-55.

The aforesaid assessments of petitioner's asserted contract interest affect three parcels of realty described in said assessment roll as follows:

120

"Grumman Aircraft Engineering Corp.
Calverton, New York

1 T 15 16 20 41

N—Parker Road and Airport north line.
E—Parker Road
S—School District No. 2
W—Airport west line

100 4475 interest under contract with U. S. of 4/1/54

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total $17,000

"Assessment of Property Omitted from the 1954 Assessment Roll and Assessed this Year Pursuant to the Provisions of Section 24 of the Tax Law

Grumman Aircraft Engineering Corp.
Calverton, New York

1 T 15 16 20 41

N—Parker Road and Airport North line.
E—Parker Road
S—School District No. 2 122
W—Airport west line

100 4475 interest under contract with U. S. of 4/1/54

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total ..... $11,400"

"Grumman Aircraft Engineering Corp.
Calverton, New York

2 T 15 16 23 45 123

N—School Dist. 1, Mdl Cy. Rd. & Sel. Dist. 4
E—Airpt east line and Sel. Dist. 4 and, in part by Line Rd.
S—Peconic River Airpt. so. line, Swan Pond Rd. & Wading River Rd.
W—Wading River Rd & Airpt west line

3635 4475 interest under contract with U. S. of 4 1 54

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total $631,300

124 *Exhibit B, Annexed to Petition*

ASSESSMENT OF PROPERTY OMITTED FROM THE 1954 ASSESSMENT ROLL AND ASSESSED THIS YEAR PURSUANT TO THE PROVISIONS OF SECTION 24 OF THE TAX LAW.

GRUMMAN AIRCRAFT ENGINEERING CORP.
CALVERTON, NEW YORK

2 T 15 16 23 45

N—Sch. Dist. 1, Mdl. Cy. Rd. & Sch. Dist. 4
E—Airpt east line and Sch. Dist. 4 and, in
125 part, by Line Rd.
S—Peconic River, Airpt so. line, Swan Pond Rd. & Wading River Rd.
W—Wading River Rd. & Airpt west line.

3635 4475 interest under contract with U. S. of 4 1 54

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total ..... $421,400"

"GRUMMAN AIRCRAFT ENGINEERING CORP.
126 CALVERTON, NEW YORK

4 T 15 16 20 50

N—Mdl. Cy. Rd. & Airpt north line
E—Airport east line
S—Peconic River
W—School District No. 2

540/4475 interest under contract of 4/1/54 with U. S.

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total $94,800

Exhibit B, Annexed to Petition 127

ASSESSMENT OF PROPERTY OMITTED FROM THE 1954 ASSESSMENT ROLL AND ASSESSED THIS YEAR PURSUANT TO THE PROVISIONS OF SECTION 24 OF THE TAX LAW

GRUMMAN AIRCRAFT ENGINEERING CORP.
CALVERTON, NEW YORK

4 T 15 16 20 50

N—Mdl. Cy. Rd. & Airpt north line
E—Airport east line
S—Peconic River 128
W—School District No. 2

540/4475 interest under contract of 4/1/54 with U. S.

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total ..... $63,200"

Petitioner objects to and protests the assessment of its alleged contract interest on the grounds that said assessments are illegal, presumptuous, improper, capricious and void. 129

The assessments are illegal because they are not authorized by the Tax Law of the State of New York. That part of the Tax Law, subdivision 17 of Section 4, Article I, which authorizes the taxation of a contract interest in real property, of which title is held by the United States, defines the taxable interest as,

" . . . contract of sale or other agreement whereby upon certain payment or payments the legal title is to be or may be acquired . . . "

130 *Exhibit B, Annexed to Petition*

Title to the parcels in question was taken by the United States of America in exercise of its power of eminent domain in a proceeding in the United States District Court for the Eastern District of New York entitled, "United States of America, Petitioner-Plaintiff, versus 4,475.23 acres of land etc., Defendants (Civil Action No. C. P. 84)" and said title is still held by the United States. Petitioner occupies the premises under the aforesaid contract dated April 1, 1954. This contract is a lease and is not a contract of sale.
131 The lease does not contain an agreement by the United States to sell or an agreement by the petitioner to buy the occupied property.

Petitioner is informed and believes that the Assessors have been advised that a certain provision of the lease constitutes a contract of sale. This provision is a conditional option. An option is not a contract of sale. It is merely an agreement by an owner to hold open for a determinable time an offer to sell at a determinable price. But the provision in question is not even an option, it is a statement of the conditions under which an option may come into being and may be exercised.
132 The conditions are:

(1) "In the event that the Facilities are determined to be excess to the further needs and responsibilities of the Department (of the Navy), and

(2) "the Department elects to terminate this lease . . . "

When these two conditions have been met,

"The Lessee shall have an option, which may be exercised * * * within 90 days after receipt of notice of termination, to purchase the Facilities . . . "

Then there is a further condition.

> (3) "Sale of the Facilities to the Lessee shall, however, be subject to the Department obtaining all necessary authorizations and approvals required to enable it to sell the Facilities to the Lessee."

Whoever asserts that this provision is a contract of sale should point out the payment or payments which are necessary to bring it within the provision of the Tax Law upon which they rely.

The petitioner maintains that the assessments 134
are presumptuous because they are asserted to be based upon the value of a right acquired by a contract of sale. If it is assumed that petitioner has a contract to purchase, it must necessarily be assumed that the Navy Department has entered into a contract to sell. The Board of Assessors thus assume that the Department, when it executed the lease, had the right to sell the property. Such assumption presumes to advise the Navy Department of its powers, and implies that the third condition of the potential option, namely that "all necessary authorizations and approvals required to enable it (the Department) to sell the Facilities 135
to the Lessee" be obtained, was included in the option provision for no good reason.

Said assessments are improper and capricious because, in addition to the false premise upon which they are assessed against petitioner, the values set forth are established by a theory which is a contradiction of all sound accounting principles, and which, if officially adopted by petitioner, could result in charges of fraud by its stockholders. The theory briefly is that any items for which a corporation has paid and for which it has not been repaid must, to avoid a charge of wasting corpor-

136 *Exhibit B. Annexed to Petition*

ate assets, be included on the asset side of its balance sheet. It would be bad enough to pad the Good Will item with such expenses, but the Assessors go further and assess such expenses as real property. The only pretext by which they can perform such legerdemain is by calling these items "payments" under the "contract of sale". Let us examine these "payments".

1.	Loss by petitioner on acreage sold to the U. S. Government	$ 1,052.00
137 2.	Cost of engineering survey made at petitioner's expense prior to contract with U. S. Government for establishment of Facilities	5,960.00
3.	10% of the cost of constructing improvements on Government property at Government expense on the theory that petitioner contributed services worth 10% in supervising the several contracts involved	2,350,000.00
138	Total	$2,356,112.00
	With a deduction for property in another town, and "equalizing" the assessment at 33%, the total assessed value for the Town of Riverhead is	$ 743,100.00

The assessments complained of are void because they purport to measure the value of an interest which does not exist and which under the contract of lease, relied upon by the assessors, can not exist as a matter of law.

Exhibit B. Annexed to Petition

The attempt to tax petitioner as a lessee of Government property upon a purely fictitious hypothesis constitutes an indirect effort to tax property of the United States Government, contrary to the provisions of the Tax Law of the State of New York, Article 1, Sect. 4, and of the Constitution of the United States and laws enacted thereunder, and as such is illegal and void.

Wherefore, Petitioner demands that the assessments above set forth be stricken from the roll and that said parcels be shown on said roll as exempt property.

Dated, July 12, 1955.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

By E. CLINTON TOWL
Administrative Vice President

(Verified July 12, 1955)

142 **Notice of Motion to Dismiss Under Rule 106 R. C. P.**

SUPREME COURT

COUNTY OF SUFFOLK

[SAME TITLE]

PLEASE TAKE NOTICE that on the Petition herein a motion will be made at a Special Term of the
143 Supreme Court, to be held in and for the County of Suffolk, at the County Court House, at Riverhead, New York, *on the 29th day of September, 1955*, at the opening of the Court on that day or as soon thereafter as counsel can be heard, for an order dismissing the petition herein on the ground that the petition does not state facts sufficient to warrant the relief under the provisions of Article 13 of the Tax Law of the State of New York, and for such other and further relief as may be proper, with the costs of this motion.

Dated: Riverhead, New York,
144 September 21, 1955.

Yours, etc.,

REGINALD C. SMITH,
Attorney for Respondents,
Office and Post Office Address,
137 West Main Street,
Riverhead, New York.

To:

CHARLES KINGSLEY, ESQ.,
Attorney for Petitioner,
South Oyster Bay Road,
Bethpage, New York.

Excerpts from Argument Before Special Term, October 21, 1955

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SUPREME COURT

SUFFOLK COUNTY

[SAME TITLE]

Riverhead, New York.
October 21, 1955.

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BEFORE: HON. HOWARD T. HOGAN, Justice.

APPEARANCES:

CHARLES KINGSLEY, ESQ.,
Attorney for Petitioner.

REGINALD C. SMITH, ESQ.,
Attorney for Respondents.

(Page numbers shown in bold brackets are from the stenographer's transcript.)

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[2] Mr. Smith: I represent the Town of Riverhead in a proceeding under Article 13 of the Tax Law to review an assessment. The reason why I speak first is that I have a motion to dismiss the petition on the ground that there is no triable issue of fact, and that the papers of the petitioner alone show that it is an issue of law and that there is no issue of fact, and accordingly, I move to dismiss that petition.

I admit that there is very definitely a problem for this Court to decide, but I think that it can be decided on the short record, and the motion would

148 *Excerpts from Argument Before Special Term, October 21, 1955*

ordinarily be made under rule 106. In a proceeding such as this, I believe it is Section 291 of the Tax Law requires that the school districts, though not necessarily parties to the proceeding, must receive copies of the notice of the application of the taxpayer, and in this instance there are three school districts within the area of the Grumman Aircraft Engineering Corporation plant, and School Districts No. 1 and 2, common school districts of the Town of Riverhead, are here this
149 morning with a petition, through Mr. Edmund S. Lapham, attorney, of Riverhead, [3] and School District No. 4 is here with a petition to appear amicus curiae by Mr. Horace Demarest, an attorney of Riverhead, and they at this time would like to make application to be in the proceeding.

* * *

The Court: I am going to grant the applications to permit the school boards to appear amicus curiae. All right.

* * *

150

[8] Mr. Smith: Now, pursuant to the statute, the Secretary of the Navy, was given the right to grant to Grumman a first refusal of the property. In the lease he did grant to Grumman the first refusal of the property, and we say that it is in the nature of an option; though very definitely limited, and it must be definitely limited in its scope, it is still an option to buy. It is still an agreement whereby Grumman is or may be entitled to the ownership of the property.

[9] We have, in our respective briefs, agreed upon one thing today. We have agreed that the

151

lease is valuable to Grumman. Heretofore there has not even been that concession. In their brief they admit that it is valuable to them. They admit that the leasing part is valuable to them, but not the option part, and I say it is one agreement and one agreement alone, and they can not separate from that lease that part which is for the rental of the property and that part of the lease which is for the option to buy. * * *

[12] Now I come to the motion to dismiss. The Tax [13] Law requires that a person taxed 152
on the assessment roll, assessed on the assessment roll, shall come on grievance day and make a complaint, and he must urge the grounds of his complaint. The reviewing provisions of the Tax Law, 290, et cetera, say that you must as- [13] sert the manner in which you are aggrieved. If it is an overassessment, you must state the amount thereof; if it is unequally applied, you must state the amount thereof.

Here Grumman came on grievance day, and they let us know in very definite terms that they thought it was illegal, that the whole thing was illegal and wrong, and that the property was im- 153
mune from taxation. But they did not say it was overassessed; they did not even attempt to say the amount of the overassessment; they did not say that it was unequally applied to them and therefore it was unequally applied in the wrong percentage.

They said, "It is illegal, it is illegal, it is illegal. Take it off, cancel it." And that is what was reviewed by the Board of Assessors, then sitting as a Board of Review, on grievance day. That alone, the question of legality, was determined by them.

and the amount of overassessment did not need to be con [14] sidered, sir, because it was not raised. If it had been raised, we could have gone into the formula of assessment.

* * *

But they didn't question the amount of overvaluation; they didn't question whether it was equally or unequally applied. And I say to you, sir, there is no issue here except the legality of
155 the total [14] assessment.

Now, there has been raised the authority to tax even the corporation for something that the government will eventually have to pay. They set forth in their brief that ninetyfive per cent of the work being done at this time is in U. S. Navy planes. That is not part of the record, but I do not have any particular objection to that. We can say, however, that [15] tomorrow it may be five per cent navy planes and ninety five per cent for American Airlines, under the statute and under the agreement.

The Court (addressing Mr. Kingsley): All
156 right.

Mr. Kingsley: I think I will take up Mr. Smith's last point first. He claims that we made no claim of overassessment or overvaluation. We never did use the word "overvaluation." We did, however, say, "The assessments complained of are void because they purport to measure the value of an interest which does not exist." Under the maxim that the greater includes the less, if there were no interest then it is overvalued. The whole thing is, of course, merely an inclination to play on the technical meaning of words, and it is not

the intent of the statute to limit a petitioner to any form of words when he has a complaint to present before the Board of Assessors. 157

Mr. Smith: May I concede, on the record at this [16] time, that I agree with him on that, that if there is no interest it is overvalued.

Mr. Kingsley: Mr. Smith has said that there is no direct precedent, possibly in the nature of an apology for the number of inapplicable cases that he has cited. The fact is that Section 17, sub-division 17 of the Tax Law, has been in its present place since 1933, and forms of lease such as the present one in substance have been used by the government since 1940, to my knowledge, when I first got into the government type of contract, and there are no cases whatever that cite that any such option or any such lease is within the definition of sub-division 17. 158

• • •

[17] Now, this particular agreement that we have is a lease. It does have a conditional option agreement [18] in it. As a lease, it is personal property. As an option, it is personal property, and if we were in a state which permitted taxation of personal property, this could undoubtedly be valued and taxed. But we are not in such a state, and we are not going to submit to this fiction of calling personal property an interest in real property, a taxable interest in real property. The equitable and the legal title to this particular property is in the United States government, and in nobody else. 159

Now, when we talk about value, we admit that this leasehold has value. It doesn't mean that it

has to be taxable value. It doesn't mean that it can be expressed in dollars and cents. A man's reputation is valuable, but you do not value it in money until he loses it through a libel, or something of that sort.

It is not transferable. Our lease is not transferable; our possession option is not transferable. The option is so hedged around with restrictions that it is a very questionable asset, if it is an asset at all.

161 [19] * * * There is quite a body of law and a number of government regulations, which I do not have here but which could be produced if we go on to press our original petition for review, to show that the government can not sell any property until it is declared surplus to the government's needs or excess to the government's needs.

Now, the procedures generally, which I have outlined in my brief, are that when a department that has jurisdiction of the property finds out that it is excess to its needs, it is then circulated amongst other departments of the government to
162 see whether they have any use for it, and if none of them has any use for it, it then goes to the General Services Administration, which may dispose of it and usually disposes of it by referring it back to the department which had original jurisdiction and allows them to dispose of it.

That is what is meant in our potential option, that if we agree to purchase this property in the event that they terminate our lease, then the Navy Department will transfer the title provided it can get the necessary consents, which is a pretty involved proposition.

[20] Now, in this particular, basic all these initial recitations show compliance with the statute. The government owns the property; the Secretary of the Navy has determined that the plant and supporting facilities are not excess to the needs of the department but are not for the time being required for public use. Now, that sets up the condition precedent for a lease. They can't sell it because it isn't excess to the needs of the department. They can't even assign it to another department, because it isn't excess to 164
the needs of the department. But being not for the time being required for public use does permit them to lease it.

Then they go through the other recitations which are necessary, that we are a contractor and that it is made under the authority of the law and has been approved by the Armed Services Committee of Congress, and all those conditions were met with before they entered into this agreement.

Now, the condition to expend a million dollars on the property does not set up any right of the county to tax it even if we had spent the 165
million dollars. We would not own those improvements. They would be [21] improvements to the leasehold and would be written off under our contracts as part of leasehold improvement, which would be charged to the cost of production both in the Navy accounting procedures and the United States Treasury Department procedures for tax purposes. So that the company, by putting this improvement in, would be enriching the government but not at its own expense, because it would indirectly be reimbursed, because it is

including over the period of years the cost of the improvements in the cost of its product.

I have cited the case of County of Allegheny, which is the Mesta Machine case, in which the Supreme Court definitely decided against the attempt of the County of Allegheny to assess taxes against a government contractor, on the theory that such taxes were actually assessed against the government because the government had to pay them, and that would be the case if these taxes
167 were sustained here, and if the government consented to their being sustained here, because it is up to the government to allow us to charge them off as a cost of production. If the government does not do so, then the Grumman Company would have to pay it out of its profits after taxes, if we had any [22] profits.

The Court: Pardon me, counsellor. In other words, then, there is no provision in this leasehold agreement with the United States government relative to taxes? In other words, there is no such contingency provided for?

168 Mr. Kingsley: Oh, I don't want you to get that idea, your Honor. There is a contingency that if the Congress of the United States should enact a law permitting the taxing of real property owned by the government and occupied by a contractor, then that contractor shall pay such taxes and the rental will be renegotiated.

The Court: But it is only under those circumstances?

Mr. Kingsley: There is another provision in the law, which my colleague seems to read in his favor, and that is that there is an exception—the

taxes may be paid if the possessory interest is taxable. Well, the possessory interest as a leasehold is not taxable in this state. There are other states where the government recognizes such taxes, but not in New York. There is no personal property tax in New York.

[23] It is our position that we have cooperated fully with the tax assessors in giving them all the information that was necessary. They were determined to find something taxable and adopted a most unusual, to quote my friend's language, 170
method of assessment.

We have been supplied with the minutes of the meeting at which they were advised that the Town could make the assessment, and they have adopted a method which I have outlined in my brief, which is utterly fantastic and unrealistic.

The Court: All right.

Mr. Smith: Your Honor raised the point about the right to charge back taxes levied, and I would like to read that to you as another indication of the consent of the federal government that their possessory interest in this contract is taxable. 171
This is Article 9 of their agreement, which was made pursuant to that statute that I quoted: "In the event that as a result of any future act of Congress subjecting government-owned property to taxation, taxes, assessments or similar charges are imposed by state or local authorities upon the property leased herein (other than upon lessee's possessory interest therein) . . . "

[24] Now, it is the lessee's possessory interest therein that we have assessed and we propose to tax. We do not wish to have the Court under-

172 *Excerpts from Argument Before Special Term, October 21, 1955*

stand that we are attempting to tax anything that belongs to the United States of America.

• • •

[26] Mr. Kingsley: "Possessory interest" is used very broadly by my opponent. Possessory interest under a lease is not taxable. It is the equitable title, the equitable possessory interest, which is taxable, and we don't have that in this case.

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The Court: All right, gentlemen, I will take your papers and your memoranda.

[27] Now, counsel for the school districts, if you gentlemen wish to submit memoranda, I would appreciate it if you, too, would have everything in here by Friday.

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Final Order Appealed From

At a Special Term of the Supreme Court of the State of New York held in the County of Suffolk, at the County Court House, Riverhead, New York, on the 4th day of January, 1956.

PRESENT: HON. HOWARD T. HOGAN, Justice.

[SAME TITLE]

176

The petitioner having instituted a proceeding under Article 13 of the Tax Law of the State of New York to review the assessments against it appearing on the 1955-56 assessment roll of the Town of Riverhead, New York, and praying that the same be declared illegal, erroneous and void and that the same be stricken from the said assessment roll, and on the return of said petition on the 21st day of October, 1955 the respondent by its attorney, Reginald C. Smith, having moved for an order under Rule 106 of the Rules of Civil Practice to dismiss said petition on the ground 177
that it did not state facts sufficient to warrant the relief prayed for; and the said motion having regularly come on to be heard before this Court on the 21st day of October, 1955, now on reading and filing the notice of motion dated the 21st day of September, 1955, the petition and notice pursuant to Article 13 of the Tax Law, dated the 9th day of September, 1955, and after hearing Reginald C. Smith, Esq., attorney for respondents in support of said motion, and Charles Kingsley, Esq. in opposition thereto, and due deliberation

178 *Final Order Appealed From*

having been had thereon, and upon filing the opinion of the Court dated the 7th day of December, 1955,

Now, on motion of CHARLES KINGSLEY, attorney for petitioner, it is

ORDERED, that the respondents' motion to dismiss the petition under Rule 106 of the Rules of Civil Practice is in all respects denied, and it is further

179 ORDERED, that the petition is sustained and the assessments against petitioner being illegal, erroneous and void, it is further

ORDERED, that the respondents, The Board of Assessors of the Town of Riverhead, New York, and all tax officials having jurisdiction thereof, strike from the assessment roll for the year 1955-56 the assessments against Grumman Aircraft Engineering Corporation appearing thereon.

Enter,

H. T. H.
J. S. C.

180

Decision—Opinion of Hogan, J.

181

Dated December 7, 1955

SUPREME COURT

SUFFOLK COUNTY

[SAME TITLE]

Petitioner has instituted a proceeding under Article 13 of the Tax Law to review and strike from the rolls, the assessments made against it on 182
the 1955-56 assessment roll of the Town of Riverhead, covering its alleged interest in certain real property lying in said Town, owned by the United States but occupied by petitioner under a lease. Upon the return of said petition, the respondent moved that it be dismissed upon the ground that it failed to state facts sufficient to warrant such relief.

It is the petitioner's contention that it has absolutely no assessable or taxable interest whatsoever in the property involved. The Court is called upon to determine whether the "Supplemental Facilities Agreement" between the petitioner and the United States of America brings 183
it within the operation of Section 4, Subdivision 17 of the Tax Law of the State of New York, which statute directs the taxation of the interest of a corporation in real property held under an agreement, "- - - whereby upon certain payment or payments, the legal title is to be or may be acquired by such corporation - - -".

The Supplemental Facilities Agreement was entered into on August 26, 1954, under the authority of Title 34, Section 522 (a) of the United

States Code. In form it is a lease of certain land and improvements owned by the Government, lying in the Towns of Riverhead and Brookhaven, and constituting the Naval Industrial Reserve Aircraft Plant, D. O. D., No. 466.

Article X thereof is entitled "Improvements, Mobilization and Option to Purchase" and reads as follows:

"ARTICLE X—IMPROVEMENTS, MOBILIZATION AND OPTION TO PURCHASE.

185 "(a) In the event that the Facilities are determined to be excess to the further needs and responsibilities of the Department, and the Department elects to terminate this lease in accordance with the provisions of paragraph (d) of Article VII hereof, the Lessee shall have an option, which may be exercised by notice of intention to purchase delivered to the Department at any time during a period of ninety (90) days after receipt of notice of termination, to purchase the Facilities at thier original cost to the Government less depreciation on improvements (exclusive
186 of improvements financed by Lessee) at the rate of 3% per annum from the date of completion of the Facilities to the date notice of Lessee's intention to exercise such option is received by the Government. Sale of the facilities to the Lessee shall, however, be subject to the Department obtaining all necessary authorizations and approvals required to enable it to sell the Facilities to the Lessee.

"(b) In the event Lessee purchases the Facilities in accordance with paragraph (a) hereof, the Lessee hereby covenants and

agrees that, for a period of twenty (20) years from the date of the deed which effects a transfer of said Facilities to the Lessee, it will maintain said Facilities in such condition that they will at all times be capable of producing military aircraft for the department within thirty (30) days after receipt by Lessee of a mobilization notice from the Department; and Lessee further agrees that such covenant may, at the option of the Department, be made a part of the deed of conveyance from the Government. 188

"(c) The Lessee hereby covenants and agrees that, subject to and in accordance with the provisions of Article XI hereof, it will, within five (5) years from the date hereof, expend not less than $1,000,000 for the construction of additional buildings, structures or other improvements to the Facilities. In the event that this lease is terminated by either party prior to the expiration of the first five year term hereof, then the provisions of this paragraph (c) shall be of no force and effect; *provided, however*, that if 189 this lease is terminated during the first term hereof and the Facilities are sold to the Lessee in accordance with the provisions of paragraph (a) of this Article and Lessee at the date of the sale has not expended $1,000,000 for the construction of additional buildings, structures or other improvements to the Facilities, then the deed of conveyance to Grumman Aircraft Engineering Corporation shall contain a covenant on the part of Grumman Aircraft Engineering Corporation to carry out the provisions of this paragraph (c).

It should be noted that the lessee is not granted an absolute option, but merely a right of first refusal when *and if* the Government elects to terminate the lease, and when and if the Navy Department obtains all necessary authorizations and approvals. These "necessary authorizations and approvals" have been described to the Court by petitioner's counsel as follows:

> "- - - when a department that has jurisdiction of the property finds out that it is
191 excess to its needs, it is then circulated amongst other departments of the government to see whether they have any use for it, and if none of them has any use for it, it then goes to the General Services Administration, which may dispose of it and usually disposes of it by referring it back to the department which had original jurisdiction and allows them to dispose of it."

What the petitioner has, therefore, is simply a lease with a right of first refusal in the event that the landlord elects to, and can sell the leased
192 premises.

The Congress of the United States has permitted State and local governments to tax such leases by enacting, in 1947, Section 522e, Title 34, of the United States Code, which provides that:

> § 522 (e) LEASE OF REAL OR PERSONAL PROPERTY: STATE OR LOCAL TAXATION; RENEGOTIATION OF LEASES.
>
> "The lessee's interest, made or created pursuant to the provisions of sections 522a—522e and 522e of this title, shall be made sub

ject to State or local taxation. Any lease of property authorized under the provisions of said sections shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

In those states which permit the taxation of personal property, such a lease, as well as the conditional option, could be assessed and taxed without further ado. In New York, on the other 194
hand, it is provided that "- - - personal property, whether tangible or intangible, shall not be liable to taxation locally for State or local purposes." (Tax Law, Sec. 3)

It is fundamental, however, that the Legislature may classify property for tax purposes in any manner it deems proper (People ex rel. Holmes Electric Protective Service Co. v. Chambers, 125 N. Y. S. (2d) 436). Has it classified the interest of this petitioner arising under the Supplemental Facilities Agreement in such manner as to make it taxable? Such classification, if in fact it has been made, must be found in the aforesaid Section 4, 195
subd. 17 of the Tax Law. This subdivision was enacted in 1925, twenty-two years *prior* to the partial relinquishment by the United States of its sovereign right to exemption from State and Local taxation (U. S. C. Title 34, Sec. 522 (c), supra). Its pertinent provisions read as follows:

"Whenever the legal title of real property is in the United States - - -, but the use, occupation or possession thereof is in a corporation - - - or its - - - successor in interest, under a contract of sale or other agreement

whereby upon certain payment or payments, the legal title is to be or may be acquired by such corporation - - -, its interest in such real property shall be assessed and taxed as real property subject to the provisions of this subdivision - - . The interest in any such property of the corporation - - - which - - - is in the use, occupation or possession thereof, shall be assessed and taxed in the same manner as if said corporation - - - held the legal title to such property, except for
197 the addition to the description of the words, descriptive of the interest in the property so assessed. *Such assessment shall be at the full value of such property without deduction therefrom on account of the whole or any part of the purchase price, or other sum due on such property, remaining unpaid - - -*".

Was the Statute designed to make taxable an interest such as this petitioner's or was it intended only to reach a *vendee in possession* under an executory agreement of sale, one who was the equitable owner of the premises but who would
198 not receive legal title until a final payment had been made?

It is to be interpreted in the light of the principle that "A statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax." (Good Humor Corp. v. McGoldrick, 289 N. Y. 452, 455; See also RKO-Keith-Orpheum Theatres, Inc. v. City of New York, 285 App. Div. 374), and Chief Justice Conway of the Court of Appeals said, in

the case of American Locker Co. v. City of New York, 308 N. Y. 264:

> "Moreover, it was well said in Gould v. Gould (245 U. S. 151, 153): 'In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen. United States v. 200
> Wigglesworth, 2 Story, 369; American Net & Twine Co. v. Worthington, 141 U. S. 468, 474; Benziger v. United States, 192 U. S. 38, 55'. (See, also, Matter of Holmes Elec. Protective Co. v. McGoldrick, 262 App. Div. 514, affd. 288 N. Y. 635; Matter of Brooklyn Union Gas Co. v. McGoldrick, 270 App. Div. 186, 195, affd. 298 N. Y. 536; Matter of Good Humor Corp. v. McGoldrick, 289 N. Y. 452)".

The mandate of the Statute is that the assessment shall be at the *full value of the property*, 201
without deduction for the unpaid portion of the purchase price. Such language hardly indicates an intent to confer upon a local taxing authority the power to impose upon a lessee under a five year tenure, terminable at the will of the landlord, a tax *based upon the full value of the leased property*, merely because the lease contains a right of first refusal when and if the landlord decides to sell. The Act does not provide for an assessment at the value of the lessee's interest in the property, but for an assessment "at the full value" of *the property itself*.

Even if there were a reasonable doubt as to the effect of this language, it would have to be construed in favor of the taxpayer (Dun & Bradstreet v. City of New York, 276 N. Y. 198, 204).

The respondent has offered several decisions which, it claims, support its position. In S. R. A., Inc. v. Minnesota, 327 U. S. 558, the corporation was occupying the premises sought to be taxed under an *executory contract of sale*, under which it had obtained an equitable interest which would indefeasibly ripen into legal title when and
203 if it completed the payments on account of the purchase price. Instead of passing title subject to a purchase money mortgage, the vendor (the United States) permitted the vendee to occupy the premises, but retained title until payments were completed. It was held that the State of Minnesota could tax the vendee's equitable interest, so long as the right of the United States to repossess upon default remained paramount. The case at bar is clearly distinguishable by reason of the fact that this petitioner has no equitable ownership, nor even an absolute right to acquire ownership—under an agreement of sale, but merely a
204 right of first refusal *if* the owner should decide to sell.

In U. S. v. Woodworth, 66 Federal Supp. 641, it was held that Government owned property (in the State of New York) to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds as a bailee. The Court added the following statement by way of dictum:

> "The City and County did not undertake to levy taxes upon the interests of Eastman Kodak Company and Bausch & Lomb Optical Company (leases with conditional options to

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purchase from the United States) as they might possibly have done under Section 4, subdivision 17 of the tax law, if the interests of said corporations, as defendants contend, amounted to an interest 'under a contract of sale or other agreement whereby upon certain payment or payments, the legal title is to be or may be acquired by such corporation ---'."

This is far from holding that such interests were, in fact, taxable.

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In Dayton Development Fort Hamilton Corp. v. Boyland, 133 N. Y. S. (2d) 831, decided by Mr. Justice Ughetta, the United States leased real property in the City of New York to petitioners for a term of 75 years for the purpose of erecting housing units thereon. The lease further provided that title to all improvements constructed upon the premises by the lessees should remain in them, and that they might elect to remove such improvements upon the termination of the lease. These two circumstances, i.e., the 75 year term and the retention of title to improvements apparently formed the basis for the imposition of a real 207 estate tax. The petitioner in the case at bar has no title of any nature to the improvements.

In People ex rel. Mergenthaler v. Mills, not reported, but affirmed 281 App. Div. 167, Mr. Justice Ughetta held that where the petitioner leased real property from the Defense Plant Corporation, one of the terms of the lease being that the lessee agreed to pay all taxes on it or upon the Defense Plant Corporation, and another being that the lessee could include the amount so paid in the price it charged the United States for its height finders, and where, concededly, the Defense Plant

Corporation was not vested with tax exemption, the fact that the United States, through delay or administrative oversight, failed to convey legal title to the Defense Plant Corporation for the first years of the lease, was no ground for exempting the petitioner from local taxation. To base exemption on such a mere technicality, he said, would be to exault form over substance.

Alabama v. King & Boozer, 314 U. S. 1, is authority only for the principle that when one contracts to sell or to manufacture for the United
209 States Government on a "cost-plus" basis, the fact that any tax imposed upon the contractor will be paid indirectly by the United States, is no ground for exempting the contractor from taxation.

The Legislature may, if it sees fit, make this type of leasehold subject to local taxation at its fair value. The impact of a large operation such as this petitioner's, accompanied by an influx of hundreds of workers and their families, can result in great and sudden hardship to an established community or school district. But until the Legislature does so in plain and unequivocal language,
210 the Court is constrained to apply the aforesaid statutory rules of construction to existing legislation, and to find that the tax sought to be imposed is unauthorized. Respondent's motion to dismiss the petition under Article 13 of the Tax Law accordingly, is denied. The petition is sustained and respondent will be directed to remove from its tax rolls, the assessments set forth therein.

HOWARD T. HOGAN
J. S. C.

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Stipulation Waiving Certification

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto that the foregoing are true copies of the judgment roll, the notice of appeal, the excerpts from the argument at Special Term, taken down, and the whole thereof, now on file in the office of the Clerk of the County of Suffolk, and that certification thereof is hereby waived and that an order directing the filing of the record in the Appellate Court may be entered without further notice.

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Dated: January 10, 1956.

Reginald C. Smith
Attorney for Respondents-Appellants

Charles Kingsley
Attorney for Petitioner-Respondent

Edwin S. Lapham
Attorney for Common School Districts Numbers 1 and 2, Town of Riverhead.

Horace A. Demarest, Jr.
Attorney for Common School District No. 4, Town of Riverhead.

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214

Order Filing Record in the Appellate Division

Pursuant to the foregoing stipulation, it is

ORDERED, that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court, Second Judicial Department.

Dated: Mineola, New York,
January 11, 1956.

HOWARD T. HOGAN
J. S. C.

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216

ADDITIONAL PAPERS

TO THE

COURT OF APPEALS

217

Notice of Appeal to the Court of Appeals from Order

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF SUFFOLK

In the Matter of the application for a review under Article 13 of the Tax Law of a Tax Assessment by GRUMMAN AIRCRAFT ENGINEERING CORPORATION,

Petitioner,

218

against

File No. 28906

THE BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK, AND THE TOWN OF RIVERHEAD, a party by operation of law,

Respondents.

SIRS:

219

PLEASE TAKE NOTICE that Grumman Aircraft Engineering Corporation, the petitioner above named, hereby appeals to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, Second Judicial Department, made herein and entered in the office of the Clerk of the said Appellate Division on the 14th day of May, 1956, which said order reversed an order of the Supreme Court, Suffolk County, herein, which order was duly entered in the office of the Clerk of the County of Suffolk on the 9th day of January, 1956, denying the motion of the respondents to dismiss the peti-

220 *Notice of Appeal to the Court of Appeals from Order*

tion herein for insufficiency, finding that the assessments are illegal and directing respondents and all tax officials having jurisdiction thereof to strike the assessments from the assessment roll for the year 1955-56, and directed that said motion be granted, and the said petitioner appeals from each and every part of said order of reversal as well as from the whole thereof.

Dated: New York, New York
June 12, 1956.

221

CAHILL, GORDON, REINDEL & OHL
Attorneys for Petitioner
Office and P. O. Address
63 Wall Street
Borough of Manhattan
New York 5, New York

To:

THE CLERK OF THE COUNTY OF SUFFOLK
Riverhead, New York

REGINALD C. SMITH, ESQ.
Attorney for Respondents
222 137 West Main Street
Riverhead, New York

EDWIN S. LAPHAM, ESQ.
Attorney for Common School
Districts Numbers 1 and 2,
Town of Riverhead, *Amici Curiae*,
220 Roanoke Avenue,
Riverhead, New York

HORACE A. DEMAREST, JR., ESQ.
Attorney for Common School District
No. 4, Town of Riverhead, *Amicus Curiae*,
306 Roanoke Avenue
Riverhead, New York

Stipulation of Substitution of Attorneys

223

[Same Title]

It Is Hereby Stipulated, Consented and Agreed that Cahill, Gordon, Reindel & Ohl, 63 Wall Street, New York 5, New York, be and they hereby are substituted in place and stead of Charles Kingsley, Esq., South Oyster Bay Road, Bethpage, New York as attorneys for petitioner, Grumman Aircraft Engineering Corporation.

224

Dated: Bethpage, New York
June 4, 1956.

Grumman Aircraft Engineering Corporation

By
E. Clinton Towl
Adm. Vice President

Charles Kingsley
Attorney for Petitioner,
Grumman Aircraft Engineering Corporation

225

Cahill, Gordon, Reindel & Ohl
Cahill, Gordon, Reindel & Ohl

To:

The Clerk of the County of Suffolk
Riverhead, New York

(Acknowledged by Grumman Aircraft Engineering Corporation before Joseph P. Kissling on June 4, 1956.)

226 **Order of Reversal Appealed From**

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Second Judicial Department, at the Borough of Brooklyn, on the 14th day of May, 1956.

PRESENT HON. HENRY G. WENZEL, JR.,
Acting Presiding Justice
" GEORGE J. BELDOCK,
" CHARLES E. MURPHY,
227 " HENRY L. UGHETTA,
" PHILIP M. KLEINFELD,
Justices.

In the Matter of the application for a review under Article 13 of the Tax Law of a Tax Assessment by GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
Respondent;

against

228 THE BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK, AND THE TOWN OF RIVERHEAD, a party by operation of law,
Appellants.

The above named, the Board of Assessors of the Town of Riverhead, and the Town of Riverhead, a party by operation of law, respondents in this proceeding having appealed to the Appellate Division of the Supreme Court from an order of the

Supreme Court entered in the office of the Clerk of the County of Suffolk on the 9th day of January, 1956, denying said respondents' motion to dismiss the petition for insufficiency, finding that the assessments are illegal and directing appellants and all tax officials having jurisdiction thereof to strike the assessments from the assessment roll for the year 1955-1956, herein, and the said appeal having been argued by Mr. Reginald C. Smith of counsel for appellants, and argued by Mr. Charles Kingsley of counsel for respondent, Grumman Aircraft Engineering Corporation, and submitted by Mr. Edwin S. Lapham of counsel for Common School Districts Numbers 1 and 2, Town of Riverhead, as amicus curiae, and submitted by Mr. Horace A. Demarest, Jr., of counsel for Common School District No. 4, Town of Riverhead, amicus curiae, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed: 230

It Is Ordered that the order so appealed from be and the same hereby is reversed, without costs, and motion granted. 231

Beldock, Murphy, Ughetta and Kleinfeld, J.J. concur; Wenzel, Acting P.J. dissents and votes to affirm with memorandum as contained in opinion and decision slip herein, dated May 14th, 1956.

Enter:

J. J. Callahan,
Clerk.

232 **Opinion of Reversal**

[Same Title]

In a proceeding under article 13 of the Tax Law to review tax assessments, the appeal is from an order denying a motion to dismiss the petition for insufficiency, finding that the assessments are illegal, and directing appellants and all tax officials having jurisdiction thereof to strike the assessment from the assessment roll for the year
233 1955-1956. Title to the property was in the United States. Appellants based the assessment upon subdivision 17 of section 4 of the Tax Law which provides that where legal title to real property is in the United States, a tax assessment may be levied against the interest of an occupant or possessor thereof under an agreement whereby upon certain payment or payments legal title may be acquired by the occupant. The respondent was in possession under a lease containing an option to buy at a certain price in the event that the lessor, pursuant to other provisions of the lease, elected
234 to terminate the lease and dispose of the property as surplus. The order appealed from is based upon the determination that the statute involved applies only to a holder of equitable title in possession of property. Order reversed, without costs, and motion granted. The statute applies to an occupant in possession under any agreement whereby he may, upon certain payments, acquire legal title. The leasehold interest, including the option to buy at a certain price and under certain conditions, is a taxable interest under the statute. Beldock, Murphy, Ughetta and Kleinfeld, JJ., concur. Wenzel, Acting P.J., dissents and votes to affirm with the following memorandum: Real

property owned by the United States and in possession of a vendee under an executory contract of sale is taxable as real property (Tax Law, sec. 4, subdiv. 17; 68 N. Y. St. Dept. Rep. 425; S. R. A., Inc. v. Minnesota, 327 U. S. 558). The ownership by the United States would not bar local taxation of respondent's interest if the New York statutes made any provision for taxing such interest (U. S. Code, tit. 34, sec. 522c). Inter alia, the lease authorized the lessor to terminate the lease at any time during a declared national emergency or on ninety days' notice by the Secretary of the Navy whenever he determines that the interests of national defense so require. No title to the real property, legal or equitable, was in the respondent. It did not own the buildings nor did it have the right to remove them. The United States did not hold merely a naked legal title and a nominal interest (see e. g., United States v. Allegheny County, 322 U. S. 174, 187). Such interest as the respondent had was not taxable as real property (People ex rel. Int. Navigation Co. v. Barker, 153 N. Y. 98; People ex rel. Hudson River Day Line v. Franck, 257 N. Y. 69; 1949 Atty. Gen. 90; cf. People ex rel. Muller v. Board of Assessors, 93 N. Y. 308, and Dayton Development Ft. Hamilton Corp. v. Boyland, 133 N. Y. S. 2d. 831, aff'd — App. Div. 2d. —, Second Dept., decided April 30, 1956; see, e. g., Matter of Althause, 63 App. Div. 252, aff'd 168 N. Y. 670).

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Stipulation Waiving Certification in the Court of Appeals

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing are true copies of the papers on appeal to the Appellate Division, Second Department, the Notice of Appeal to the Court of Appeals, the Stipulation of Substitution of Attorneys, the Order of Reversal Appealed From and the Opinion of Reversal, and all of the papers used upon the hearing of the appeal in the Court below and the whole thereof now on file in the office of the Clerk of
239 said Appellate Division and in the office of the Clerk of the County of Suffolk; certification thereof is hereby waived.

Dated, New York, N. Y., July 2, 1956.

CAHILL, GORDON, REINDEL & OHL,
Attorneys for Petitioner-Appellant

REGINALD C. SMITH,
Attorney for Respondents

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MAY 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. ~~1022~~ 136

In the Matter of the Application for a Review under Article 13 of the Tax Law of a Tax Assessment by

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
Petitioner-Respondent,

against

THE BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK, and THE TOWN OF RIVERHEAD, a party by operation of law,
Respondents-Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REGINALD C. SMITH,
Counsel for Petitioners.

CHARLES A. ELLIS,
of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. _____

In the Matter of the Application for a Review under Article 13 of the Tax Law of a Tax Assessment by

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
Petitioner-Respondent,

against

THE BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK, and THE TOWN OF RIVERHEAD, a party by operation of law,
Respondents-Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners, The Board of Assessors of the Town of Riverhead, New York, and the Town of Riverhead, Respondents below, pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, and the judgment of the Supreme Court of the State of New York, Suffolk County, entered thereon, in the above entitled matter.

The Opinions of the Courts Below

The opinion of the Supreme Court, Special Term, Suffolk County (R. 61-70; Hogan, J.), printed in the Appendix hereto, infra, p. 30, is reported in 3 Misc. 2d 339, and 148 N. Y. Supp. 2d 24.

The opinion and dissenting opinion of the Appellate Division, Second Department (R. 78-79), printed in the Appendix hereto, p. 39, are reported in 1 App. Div. 2d 1021, and 151 N. Y. Supp. 2d 786.

The original opinion and dissenting opinion in the New York Court of Appeals, printed in the Appendix hereto, p. 41, are not yet officially reported.

The opinion of the New York Court of Appeals on motion for reargument or in the alternative to amend the remittitur, printed in the Appendix hereto, p. 59, is reported in The New York Law Journal, April 16, 1957, vol. 137, No. 73, p. 4, col. 8, but is not yet officially reported.

Jurisdiction

The decision and judgment of the New York Court of Appeals sought to be reviewed was dated and remitted to the Supreme Court, Suffolk County, March 8, 1957. The order on remittitur made by the Supreme Court of the State of New York, Suffolk County, making the order of the Court of Appeals the order of the Supreme Court, was dated and entered March 27, 1957.

Thereafter petitioners made a timely motion for reargument and in the alternative to recall and amend the remittitur; and on April 12, 1957, the Court of Appeals made an order denying reargument but granting the motion to amend the remittitur. The order on amendment of remittitur made by the Supreme Court of the State of New York, Suffolk County, making the order of the Court of

Appeals the order of the Supreme Court, was dated and entered April 23, 1957.

The jurisdiction of this Court is found in 28 U. S. Code, §§ 1257(3) and 2101(e).

Questions Presented

1. Whether the decision herein unlawfully deprives the petitioners, Town of Riverhead and its Board of Assessors, of a right and privilege established for their benefit by Congress in exercise of its plenary powers under Art. 4, § 3, cl. 2 and Art. 1, § 8, cl. 18 of the United States Constitution; and whether this also violates Art. 6, cl. 2 of the United States Constitution.

2. Whether by § 6 of the Act of August 5, 1947 (34 U. S. C. A. § 522e) Congress effectively mandated, conditioned or required that the interest of Grumman, when made or created in 1954 pursuant to the provisions of such Act of Congress, be then and thereby made subject to local taxation by petitioners.

3. Whether the national policy and program of relieving local governments of the disastrous impact on their revenues of Government exemptions, and the manifest purpose and intent of Congress in enacting 34 U. S. C. A. § 522e and related legislation, are such as to require that the Federal statute, Federal contract and such State laws as affect the carrying out of such national policy and program be liberally interpreted in favor of rather than strictly interpreted against the right and power of petitioners to tax the interest of Grumman under its contract with the United States.

4. Whether the decision herein erroneously makes Grumman the beneficiary, at the expense of the United States and the Town, of funds intended by Congress for the benefit of the Town, and permits Grumman to make the United States and the Town the victims rather than the

beneficiaries of the United States exemption, the Act of Congress in exercising its plenary power, and the Federal contract by which the interest of Grumman was made and created subject to local taxation.

5. Whether by 34 U. S. C. A. § 522e and the Federal contract made pursuant thereto Grumman is precluded from pleading and the State courts are precluded from considering on Grumman's behalf any exemption of the United States or that a local assessment by petitioners of the interest of Grumman is an indirect tax on or an indirect attempt to tax property of the United States which is exempt from tax.

Constitutional and Statutory Provisions Involved

The Constitutional provisions involved are Art. 4, § 3, cl. 2; Art. 1, § 8, cl. 18 and Art. 6, cl. 2 of the United States Constitution, printed in the Appendix, infra, pp. 25-27.

The Federal statutory provisions involved are Sections 1 and 6 of the Act of August 5, 1947, c. 493, 61 Stat. 774, 775, and amendment to Section 1 by Act of September 28, 1951, c. 434, Title VI, § 605, 65 Stat. 366; 34 U. S. C. §§ 522a and 522e, printed in the Appendix, infra, pp. 25-27.

The New York State statutory provisions involved are Tax Law, 59 McKinney's Consolidated Laws of New York, Part 1, § 3 and § 4, pars. 1 and 17, printed in the Appendix, infra, pp. 27-29.

Statement of the Case

By agreement of April 1, 1954 (R. 15), between the United States and Grumman Aircraft Engineering Corporation,* a New York corporation, Grumman leased from

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* Hereinbefore in Questions Presented and hereinafter referred to as Grumman.

the United States, with an option to purchase, the valuable plant and facilities established by the Government for Grumman's use at Calverton, Suffolk County, New York, the greater part of which is in the Town of Riverhead, New York.

The agreement specifically was "made under the authority of and in accordance with the provisions of the Act approved August 5, 1947 (34 U. S. C. 522a)" (R. 16). It specified a term of five years, with an option to Grumman to renew for two successive five year periods (R. 17-18); a right of Grumman to use the property "For all general industrial purposes" (R. 18); and an option to Grumman to purchase the facilities at their original cost to the Government less depreciation at 3% should the Government determine the facilities to be excess to the further needs of the Department (R. 29).

Deeming the interest of Grumman as one "made or created pursuant to the provisions" of the Act of August 5, 1947, and, under 34 U. S. C. § 522e, thereupon and thereby effectively severed for tax purposes from exempt Government ownership, and "made subject to State or local taxation", the Board of Assessors of the Town of Riverhead assessed taxes against the Grumman interest for the years 1954-1955 and 1955-1956 (R. 40-43). In conformity with the New York Tax Law exemption provision, Tax Law § 4(17), that the assessors use "the addition to the description of the words 'interest under contract,' or other appropriate words descriptive of the interest in the property so assessed" (59 McKinney's Consol. Laws of N. Y., Part I, § 4, par. 17), the assessments specified a fractional "interest under contract with U. S. of 4/1/54", and stated that the interest of the United States "is not assessed or taxed" (R. 40-43).

Grumman filed an objection and protest (R. 40), alleging the assessments to be void because they purport to measure the value "of an interest which does not exist and which

under the contract of lease, relied upon by the assessors, can not exist as a matter of law" (R. 46), and that

> "The attempt to tax petitioner as a lessee of Government property upon a purely fictitious hypothesis constitutes an indirect effort to tax property of the United States Government contrary to the provisions of the Tax Law of the State of New York, Article I, Sect. 4, and of the Constitution of the United States and laws enacted thereunder, and as such is illegal and void" (R. 47).

The Federal questions sought to be reviewed thus were first raised in the original objection and protect of Grumman.

Grumman then petitioned the New York Supreme Court, Suffolk County, to order the Assessors "to strike said assessments against your petitioner from the rolls and that the said premises be shown on said rolls as exempt property" (R. 14). Its petition, showing the same assessments (R. 8-11), alleged that the assessments were illegal, erroneous and void

> "on the ground that the assessments are against real property owned by the United States of America which is specifically exempt from tax under the provisions of the Tax Law of the State of New York, Article I, Section 4, and the Constitution of the United States; on the ground that they are illegal and void, being an indirect assessment and tax on real property of the United States of America, which is specifically exempt from tax by law as aforesaid" (R. 13).

The Federal questions sought to be reviewed thus were raised in the court of first instance by the petition of Grumman to that Court.

Your petitioners, respondents below, moved to dismiss the Grumman petition as failing to state facts sufficient to warrant relief (R. 48).

On argument of the motion Grumman's counsel relied on "the case of County of Allegheny, which is the Mesta Machine case" (R. 56), i.e., *United States* v. *County of Allegheny*, 1944, 322 U. S. 174, which, at p. 182 quotes, and throughout discusses the effect of Art. 4, § 3, cl. 2; Art. 1, § 8, cl. 18 and Art. 6, cl. 2 of the United States Constitution, relied on by your petitioners herein. Thenceforth, and on the hearing of the appeals in the Appellate Division and the Court of Appeals, the *United States* v. *County of Allegheny* decision, its applicability herein, and its construction of the said Constitutional provisions were a major subject of contention. The decision is cited in the dissenting opinion in the Appellate Division and is cited and quoted from in the majority opinion of the Court of Appeals.

The Supreme Court at Special Term denied your petitioners' motion to dismiss, and granted Grumman judgment that "the petition is sustained" and, holding the assessments illegal, erroneous and void, ordered them stricken from the assessment roll (R. 60).

Your petitioners appealed to the Appellate Division, Second Department; and that Court reversed four to one (R. 78-79; Appendix, infra, pp. 39-40).

Grumman then appealed to the Court of Appeals; and that Court reversed the Appellate Division and reinstated the Special Term judgment, four to three (Appendix, infra, p. 54).

On motion by your petitioners for reargument or in the alternative to amend the remittitur, the Court of Appeals denied the motion for reargument, but granted the motion to amend the remittitur, and certified that upon the appeal "there was presented and necessarily passed upon a question under the Constitution and statutes of the United States," citing your petitioners' reliance on Article IV, cl. 3; Article I, cl. 18 and Article VI, cl. 2 of the Constitution, the Act of August 5, 1947, c. 493, § 6, 34 U. S. C. § 522c, and

the contract between Grumman and the United States Government (Appendix, infra, p. 59).

Reasons for Allowance of the Writ

The case is one in which title, right, privilege and immunity of the parties have been set up and claimed under the Constitution and statutes of the United States, and where the validity of a state statute, as construed by the New York Court of Appeals, is drawn in question on the ground of its being repugnant to the Constitution and laws of the United States (28 U. S. C. A., § 1257, par. (3)). And the decision fails to accord with and conflicts in fundamental principle with decisions of this Court.

The Court of Appeals of the State of New York, by a bare majority—four to three—has deprived the petitioners, Town of Riverhead and its Board of Assessors, of the right and privilege (28 U. S. C. A. § 1257, par. (3)), under the Act of August 5, 1947 (34 U. S. C. A. § 522e) and respondent's contract thereunder, to tax the "lessee's interest" made and created pursuant to the provisions of said Act of Congress. It reversed the Appellate Division, Second Department, which had ruled four to one in petitioners' favor after a Justice of the Supreme Court at Special Term had ruled for respondent. The State court judges thus have been so divided that seven have voted in favor of petitioners and six in favor of respondent*, but with the Court of Appeals decision controlling, four to three, against petitioners.

In so ruling the Court of Appeals majority, by intermixed arguments based on Federal and preexisting State

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* Judges voting to sustain the tax: In the Court of Appeals, Conway, Ch. J., Fuld and Burke, JJ. (3); In the Appellate Division, Beldock, Murphy, Ughetta and Kleinfeld, JJ. (4); total 7.

Judges voting against the tax: In the Court of Appeals, Dye, Dysmond, Froessel and Van Voorhis, JJ. (4); In the Appellate Division, Wenzel, Acting P.J. (1); In Special Term, Hogan, J. (1); total 6.

laws of exemption from local taxation, has misinterpreted and misapplied this Court's decision in *United States* v. *County of Allegheny*, 1944, 322 U. S. 174, and has failed to give effect to

1. The provisions of Art. 4, § 3, cl. 2 and Art. 1, § 8, cl. 18 and Art. 6, cl. 2 of the United States Constitution;

2. the terms and conditions of 34 U. S. C. A. § 522e statutorily imposed by Congress in exercise of its plenary and unlimited power under Art. 4, § 3, cl. 2 of the Constitution; and to

3. the terms and conditions of the agreement of April 1, 1954 made between Grumman and the Government pursuant to said Act of Congress; and

4. has permitted Grumman to violate, override and circumvent the Constitution of the United States, the provisions of the Act of Congress, and the terms and conditions of the Federal contract by which the interest of Grumman was made and created; and

5. has given Grumman the benefit of a strict construction against the Town, instead of giving the Town the benefit of a liberal or practical construction such as required in order to promote the national policy instituted by Congress for benefit of the local community.

The decision in effect makes Grumman the beneficiary, at the expense of the United States and the Town, of funds or rights to funds intended by Congress for the benefit of the Town, and thus permits Grumman to make the United States the victim rather than beneficiary and sole dispenser of an alleged exemption of the United States.

This Court has recognized that the amount of rent a lessee pays to an exempt landlord is affected by whether the lessee is or is not entitled to share the landlord's exemption. "If . . . the interest of the lessee in the land so leased should be exempt from taxation, it may readily be seen that the amount of rent which it would

receive would be larger than if no such exemption could be obtained" (*Jetton* v. *University of the South*, 1908, 208 U. S. 489, 501).

Since the Grumman lease herein was made under an Act of Congress (34 U. S. C. A. § 522e) specifically providing that "The lessee's interest, *made* or created pursuant to the provisions of . . . this title, shall be *made* subject to State *or local* taxation", it is readily apparent that the United States has charged Grumman less rent than would be the case if Grumman's interest had been *made* in any sense whatever exempt from local taxes.

Hence "it is obvious that any money withheld from the state by applying the exemption would not benefit the national exchequer but would reach the pockets of private citizens" (*Offutt Housing Company* v. *County of Sarpy*, 1955, 160 Neb. 320, 70 N. W. 2d. 382, 393; *Gay* v. *Jemison*, (Fla. 1951), 52 So. 2d 137, 138), viz, Grumman.

The United States, moreover, would be doubly victimized, if it perform obligations it has undertaken in accordance with other provisions made by Congress for alleviating the impact on local government revenues of Government exemptions. For Congress employs two methods: First, it provides for taxation of the lessee's interest, as in 34 U. S. C. A. § 522e. Second, it provides for payments to the local government "in lieu of taxes" with respect to the Government's interest. See 40 U. S. C. A. § 521, 523; 42 U. S. C. A. § 1546; see also Public Law 874, 81st Congress, § 9, par. 1; and see *Committee Report on Payments in Lieu of Taxes and Shared Revenues*, June, 1955, submitted to the Commission on Intergovernmental Relations, and *The Commission on Intergovernmental Relations, Report to the President for Transmittal to the Congress*, June, 1955. See also *Report on Federal Contributions to States and Local Governmental Units with Respect to Federally owned Real Estate*, House Doc. No. 216, 78th Cong. 1st Sess. (1943).

The Federal Government's policy of making payments to local governments "in lieu of taxes" antedated the enact-

ment of the Act of August 5, 1947. The earlier Bankhead and Lanham Acts, former 40 U. S. C. A. § 432, 49 Stat. 2036, and 42 U. S. C. A., § 1546, 54 Stat. 1127 provided for payments to local communities in lieu of taxes. See *United States* v. *Parkbelt Homes*, D. C. Md., 1948, 76 F. Supp. 297, 299, aff'd. *Parkbelt Homes* v. *United States*, 4th Cir., 1948, 171 F. 2d 230. But the attempt of a Government lessee, such as Grumman, to avoid its proportion of local taxes, or its liability to local taxation, on the basis of alleged Government exemption is novel in this court.

To exempt Grumman herein is in reality to require the United States Government to pay twice: once, by its fixing the Grumman rental at a smaller amount to allow for Grumman's liability to "local" taxation of its lessee interest, and again by the increase of the Government's payments to the Town and School Districts "in lieu of taxes", by reason of Grumman's failure to pay a tax on the "lessee's interest".

This makes Grumman the beneficiary and the United States the victim of an alleged but non-existent or inapplicable exemption of the United States. It makes Grumman the beneficiary of an exemption which the statute under which its contract was made itself provided Grumman should not be entitled to.

To exempt Grumman herein also makes of the Grumman leasehold "a favored class of property" (*Trimble* v. *Seattle*, 1914, 231 U. S. 683, 689-690), directly contrary to the Congressional mandate and Federal contract that it should not be so made. Contrasting with private leases from private landlords the cases "When an interest in land, whether freehold or for years is *severed from the public domain and put into private hands*" (231 U. S. 690), this Court said:

> "If these leaseholds are not taxable, they are a favored class of property; for ordinarily *leaseholds are taxed* even if they are lumped and included in the value of the fee" (231 U. S. 689-690). (Italics ours).

To exempt Grumman herein also, in the language of *Offutt Housing Company* v. *County of Sarpy*, *supra*, 160 Neb. 320, 70 N. W. 2d 382, 392, "would permit plaintiff to perpetrate a sham and fraud upon the state and its governmental subdivisions",—as well as a sham and fraud upon the United States. For Grumman in its Petition, pars. 10 and 14, R. pp. 12, 13, pleaded falsely that the assessments were "an indirect attempt to tax" or "an indirect assessment and tax on" real property of the United States "which is specifically exempt from tax". And the 4-3 majority opinion of the New York Court of Appeals herein gives effect to this contention of Grumman in holding that "The property is not taxable *by virtue of the overriding immunity of the United States Government as owner*. It is the local government which is attempting to levy a tax *where the property is already immune from taxation*". (Italics ours). **(Appendix, infra, p. 50).**

This contention of Grumman and this holding by the New York Court of Appeals majority is notwithstanding that the assessments herein all specify only a fractional

> "interest under contract with U. S. of 4/1/54. The interest of the United States or of this State in the foregoing property is not assessed or taxed" (R. pp. 40-43, ff. 120, 122, 123, 125, 126, 128).

The Town thus "took care to leave unassessed whatever interest the United States holds" (*S. R. A.* v. *Minnesota*, 1946, 327 U. S. 558, 565).

This contention of Grumman and this holding of the Court of Appeals majority also ignore the fact that Congress by 34 U. S. C. A. § 522e, and the Government and Grumman by their contract made under and in accordance with the Act of Congress, have effectively "*severed* from the public domain and put into private hands", as a *severed* interest, the interest of Grumman, (cf. *Trimble* v. *Seattle*, *supra*, 231 U. S. 683, 690).

In *Offutt Housing Co.* v. *County of Sarpy*, 1956, 351 U. S. 253, this Court, in affirming the Nebraska Supreme Court decision above cited, said of the 1947 Act of Congress, that

> "The legislative history indicates a concern about loss of revenue to the States and a desire to prevent unfairness toward competitors of the *private interests* that might otherwise escape taxation." (Italics ours).

This concern and this desire, and the language of the Federal statute—itself effectuating for local tax purposes a complete *severance* between the private "lessee's interest" and the Government's ownership—make the decision of the majority below one requiring review by this Court as being based upon a completely erroneous treatment of the strictly Federal questions of exemption, of national policy and national aid to local governments, and of Federal contract and property rights created under and subject to an Act of Congress effectively severing the same and providing that "The Lessee's interest . . . shall be *made* subject to State *or local* taxation."

The decision clearly is not in accord with applicable decisions of this Court or the public policy of the United States evidenced by the Statute of Congress and the Federal contract made pursuant thereto.

In *Rutherford* v. *Greene*, 1817, 2 Wheat. (15 U. S.) 196, 198, a statute provided "that 25,000 acres of land *shall be* allotted for and given to Major-General Nathaniel Greene." This Court, by Chief Justice Marshall, said:

> "the words of this section contain *a positive mandate* to them to set apart 25,000 acres for General Greene. As the act was to be performed in future, the words directing it are necessarily in the future tense. 'Twenty-five thousand acres of land *shall be* allotted for, and given to, Major-General Nathaniel Greene.' *Given when?* The answer *is unavoidable* —when they shall be allotted. *Given how?* Not by any *future* act:— for it is not the practice of legisla-

> tion to enact, that a law shall be passed by some future legislature:—but given *by force of this act.*" (15 U. S. 198). (Italics ours).

So, here, the words of § 522e contain "a positive mandate" (15 U. S. 198) that "The lessee's interest, *made or created* pursuant to the provisions . . . of this title, *shall be made* subject to State *or local* taxation." *Made subject when?* The answer here equally "is unavoidable"—i.e., when the lessee's interest shall be "*made* or created" pursuant to the Act: in this case, April 1, 1954. *Made subject how?* Not by any future legislation of either Congress or a State; for this would be to enact that a law shall be passed by some other or future legislation:—but "*made* subject to State *or local* taxation" *by force of* § *522e*, whenever the lessee's interest is "*made or created*" pursuant to that Act. It was, perhaps, not a mandate to tax; *but it was a mandate that the lessee's interest be subject to State "or local" taxation.* It was, moreover, a mandate inconsistent with and which precludes the lessee pleading or a State court holding that a tax on the lessee's interest was an indirect attempt to tax property of the United States which is exempt from tax.

In *Central Pacific Railroad* v. *Nevada*, 1896, 162 U. S. 512, 523, even where the provision was negatively that no lands previously granted shall be exempted on account of the lien of the United States, this Court said:

> "No action on the part of the State or its legislature was necessary to signify its acceptance of the authority conferred by the Federal statute . . . where a simple power is given, no acceptance of such power by the State is necessary as a preliminary to its exercise" (162 U. S. 523).

Certainly here, where the statute, § 522e, is *positive*, and where unless the "*lessee's interest*" is subjected to "local taxation" the lessee will be enriched by money intended for the Town, no action on the part of the State was necessary

to signify its acceptance for the Town of the authority and privilege conferred upon the Town by the Federal statute.*

This is more particularly true where, as here, there is not a mere grant by Congress of a power while titles remain unaltered, but a condition and requirement imposed for the benefit of the town in the very exercise by Congress of its plenary power under Art. 4, § 3, cl. 2 of the Constitution to "dispose of" property of the United States.

Under Art. 4, § 3, cl. 2, the power of Congress "to dispose of and make all needful Rules and Regulations respecting . . . Property belonging to the United States" is without limitation (*United States* v. *San Francisco*, 1940, 310 U. S. 16, 29; *United States* v. *California*, 1946, 332 U. S. 19, 27; *United States* v. *Gratiot*, 1840, 14 Pet. (39 U. S.) 526, 537-538).

A lease of federal property—even without it containing an option to purchase at a given price such as granted here—is made in exercise by Congress of its plenary power to "dispose of" property of the United States, and represents, as to the lessee's interest, equally as would a sale, a disposal of property of the United States (*United States* v. *Gratiot, supra*, 14 Pet. 538; *United States* v. *County of Allegheny*, 1944, 322 U. S. 174, 182). The property "may be leased, sold or given away upon such terms and conditions as the public interests require" (*Ruddy* v. *Rossi*, 1918, 248 U. S. 104, 106). "The United States can prohibit absolutely or *fix the terms on which its property may be used*" (*Light* v. *United States*, 1911, 220 U. S. 523, 536). (Italics ours.)

Congress, could, therefore, lease the property to Grumman on such terms as Congress saw fit to prescribe, including the right to buy, and the subjection of Grumman's interest to local taxation. It could have provided that the rent be paid to the Town, and it could equally provide for

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* Acceptance by the Town, itself, is shown "by its levy of a tax" (*S. R. A.* v. *Minnesota*, 1946, 327 U. S. 558, 564) on the lessee's interest.

payment by Grumman to the Town of a tax. It could have provided for State but not local taxation, or for local but not State taxation, or for State or local taxation.

When Congress prescribes municipal or other local rights in disposing of property of the United States, this Court held in *United States* v. *San Francisco, supra*, 310 U. S. 16, 30, that the provisions made by Congress are controlling over State or municipal action because it

> "does not represent an exercise of a *general* control over public policy in a State but instead *only an exercise of the complete power which Congress has over particular public property intrusted to it*" (310 U. S. 30). (Italics ours.)

Ever since the adoption, under the Articles of Confederation, of the Land Ordinance of 1785, setting apart section 16 of every town for school purposes (e.g. *Cooper* v. *Roberts*, 18 How. (59 U. S.) 173, 177), Congress, in exercise of its plenary power, has sought to aid in the financing of local governments, such as towns and school districts.

When the Congressional grant is direct to the town, it does not pass to the State, and the State has no power over its disposal (*Jones* v. *Soulard*, 24 How. (65 U. S.) 41; *Kissell* v. *St. Louis Public Schools*, 18 How. (59 U. S.) 19).

Equally, here, when Congress provided that "The lessee's interest . . . shall be made subject to State *or local* taxation", the statute and contract are as much for the benefit of local communities as for benefit of the states, and a right, namely the right to tax the "lessee's interest", is given directly to the local governments as fully as it is given to the State. It is not qualified by a right of the State to defeat, either by action or by inaction, the right of a local government.

The corresponding and substituted provision of the recent statute (Public Law 1028, 84th Congress, c. 1041, of August 10, 1956, 70A Stat., p. 150, 10 U. S. C. A. § 2667 (e))

which repealed 34 U. S. C. A. § 522e "except with respect to rights and duties that matured . . . and proceedings that were begun, before the effective date of this act" (70A Stat., p. 641, § 53), is confirmatory of this. The new substituted provision, 10 U. S. C. A. § 2667 (e), provides:

> "The interest of a lessee of property leased under this section may be taxed by State *or local governments*." (Italics ours.)

It is "a familiar rule in the construction of statutes, that they must be so construed as to admit all parts of them to stand, if possible" (*Heydenfeldt* v. *Daney Gold and Silver Mining Co.*, 1877, 93 U. S. 634, 640). As there stated, so here, "The point made by the plaintiff would reject a part of these words, and defeat one of the main purposes in view".

It would reject the effectiveness of the words "or *local* taxation" in 34 U. S. C. A. § 522e, and the words "or *local* governments" in the substituted 10 U. S. C. A. § 2667. The latter section does not say that the lessee's interest may be taxed by local governments if and when the State shall thereafter so provide. Nor does the former say that the lessee's interest shall be made subject to its being made subject to local taxation if and when the State shall thereafter so provide. Both alike provide directly and unqualifiedly a right of "local taxation" or of taxation by "local governments", in the same phrase and manner as they provide a right of "State . . . taxation" or of taxation by "State . . . governments".

This direct grant by Congress to the local governments of the right of local taxation, with respect to a property interest being "made or created" and disposed of by Congress, is entirely proper, since, as said in *United States* v. *San Francisco*, *supra*, it "does not represent an exercise of a general control over public policy in a State but instead only an exercise of the complete power which Congress has

over particular public property intrusted to it" (310 U. S. 30).

The "public policy" involved is a public policy of the United States, in a field where the power of the United States is supreme and plenary, rather than a public policy of the State.

A different construction, moreover, in the language of *Heydenfeldt* v. *Daney Gold and Silver Mining Co., supra,* 93 U. S. 634, 640, would "defeat one of the main purposes in view"—or rather three main purposes of Congress—when Congress enacted § 522e. One principal purpose was the Federal purpose to aid local governments and school districts affected by Government ownership of property; a second purpose was the Federal purpose to prevent unfairness between the Government lessee and its competitors; and still a third purpose was the Federal purpose to reduce the amount the Federal Government otherwise would pay "in lieu of" taxes. Each of these three Federal purposes is defeated by the judgment herein.

It defeats also even the right of the *State* under the Act of Congress to assess the "lessee's interest". For the Court of Appeals majority does not hold that State officials may but the Town may not assess a tax on Grumman's interest. It holds rather that neither State officials nor the Town may assess any tax. Congress has said, and Grumman perforce has agreed, that either may. But the Court of Appeals majority holds that neither may.

The Court of Appeals, we submit, has misinterpreted and misapplied this Court's decision in *United States* v. *County of Allegheny,* 1944, 322 U. S. 174, as also did the dissenting Justice in the Appellate Division. The *County of Allegheny* case was decided May 1, 1944, when there was no Federal statute such as § 522e; and this Court said respecting judicial and Congressional powers:

> "The equities in this unfortunate conflict between the United States and one of its most important

> *industrial communities* are not capable of judicial ascertainment or equalization. . . . We can only say that our constitutional system as judicially interpreted from the beginning leaves no room for the *localities* to impose either compensatory or retaliatory taxation on Government property interests. *Their remedy lies in petition to the Federal Congress, which also is their Congress.*" (322 U. S. 190-191). (Italics ours).

Congress then enacted the Act of 1947 here involved: The present case being one wherein the lease was made *after Congress acted for benefit of local communities* by its enactment of § 522e, the *County of Allegheny* decision thus supports rather than denies the right of the Town to tax the lessee's interest herein, as now provided by "the Federal Congress, *which also is their Congress.*" And "policies so settled under federal authority may not be *defeated or limited* by state law" (322 U. S. 183).

This ruling in the *County of Allegheny* case was based on precisely the same Constitutional provisions relied on herein, viz., Art. 4, § 3, cl. 2; Art. 1, § 8, cl. 18, and Art. 6, cl. 2 of the United States Constitution (322 U. S. 182). The power of Congress being unlimited and plenary, "No State legislation can *interfere* with this right or *embarrass its exercise*" (*Gibson* v. *Chouteau*, 1871, 13 Wall. (80 U. S.) 92, 99.) (Italics ours).

These decisions do not hold that the State may not *aid* in carrying out the Federal program. Hence State legislation effective to *aid* in carrying out the Federal program may be given effect, as in *Offutt Housing Co.* v. *County of Sarpy, supra*, 351 U. S. 253. This is because, and to the extent that, the State laws which merely *aid* in carrying out the Federal program do not "*interfere* with this right or *embarrass its exercise*" (80 U. S. 99) and do not cause the Federal program to be "*defeated or limited* by state law" (322 U. S. 183). But the majority opinion of the Court of Appeals herein would have the Federal program "defeated

or limited" by preexisting State law not enacted with respect thereto but which the majority holds, in effect, does so "interfere with" or 'embarrass the exercise' of the unlimited and plenary power of Congress as to prevent Grumman's interest being subject to local taxation as provided by Congress.

The State Court's majority opinion does this, moreover, by expressly relying upon a supposed rule requiring strict construction against the Town and in favor of Grumman of any applicable laws.*

But this Court has repeatedly held that where a Federal statute (the Miller Act) required those *contracting with the Government* to furnish a bond securing payment to all persons supplying labor or materials, both "the act and the bonds given under it must be construed liberally for the protection of those" intended to be benefited (*Brogan* v. *National Surety Co.*, 1918, 246 U. S. 257, 262), and "should be liberally construed in aid of the evident public object" (*Standard Accident Insurance Co.* v. *United States*, 1938, 302 U. S. 442, 444; *MacEvoy* v. *United States*, 1944, 322 U. S. 102, 105). The Act is "highly remedial and must be construed liberally" (*Fleischmann Co.* v. *United States*, 1926, 270 U. S. 349, 360). "The rule of *strictissimi juris* is a stringent one, and is liable at times to work practical injustice" (*Guaranty Co.* v. *Pressed Rock Co.*, 1903, 191 U. S. 416, 426).

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* For such rule it relies on *Gould* v. *Gould*, 1917, 245 U. S. 151 (alimony wrongly assessed as income); *American Locker Co.* v. *City of New York*, 1955, 308 N. Y. 264 (receipts from coin operated storage lockers wrongly assessed as sales of tangible personal property); and *Matter of Good Humor Corp.* v. *McGoldrick*, 1943, 289 N. Y. 452 (chocolate coated ice cream assessed as "candy and confectionery" but excluded as "milk and milk products"). Each involved a mere private citizen contesting a tax. None involved, as here, a Federal contract "made subject to State or local taxation" by mandate of Congress, as part of a Federal program to benefit the local communities.

In *McCarthy* v. *Mann*, 1873, 19 Wall. (86 U. S.) 20, 32, where Congress exercised its power under Art. 4, § 3, cl. 2, of the Constitution, to grant a patent to a former land claimant to "enure to the benefit of his grantees as far as he may have conveyed the same", and a later grantee of a former grantee also claimed title against the same person's prior grantees, the Court said:

> "The law is explicit and there is no difficulty in carrying out its provisions. It must be liberally construed to effect the purposes of its enactment" (86 U. S. 32).

Here, Grumman is not a mere taxpayer or citizen. It is one who has made a contract with the Federal Government. It has been granted a two-fold interest in Government property under an Act of Congress expressly providing that such interest be subject to "local taxation,". Nor is the Town merely a government assessing a tax against a citizen. The Town is as fully beneficiary of a Federal statute and Federal contract as were those supplying labor or materials under the Miller Act above mentioned or those claiming as Poncin's grantees in *McCarthy* v. *Mann, supra*. The Town, therefore, is entitled to a liberal construction in its favor rather than Grumman being entitled to a strict construction against the Town.

This rule of liberal construction has been applied, indeed, under earlier Federal statutes giving mere "consent of the United States" for taxation "under the authority of the laws of" a State of "structures and other property in private ownership" on a Federal reservation (*Ex parte Gaines*, 1892, 56 Ark. 227; *Superior Bath House Co.* v. *McCarroll*, 1941, 312 U. S. 176, 179; *Buckstaff Bath House Co.* v. *McKinley*, 1939, 308 U. S. 358, 363-364). In *Superior Bath House Co.* v. *McCarroll*, this Court said:

> "By these provisions Congress manifested its purpose that no type of privately owned property should escape the state's taxing power merely because it was owned or used on the reservation." (312 U. S. 179).

The Court noted that although structures attached to land

a Congressional provision that they be taxed as personal property controlled (312 U. S. 179).

Here, Congress has not mandated that the "lessee's interest" be taxed as personal property; nor has the State legislature; and we submit that the State judiciary may not do so as a means of defeating any local taxation. The attention of Congress clearly was directed to the real estate taxes the local communities were losing because of Government exemption. It provided for payment of part of this by the lessee as a local tax on the "lessee's interest", effectively severed for this purpose by Congress itself; and it provided by separate legislation that the remaining part be paid by the Government "in lieu of" a tax on the Government's ownership interest.

In *United States* v. *County of Allegheny, supra*, 322 U. S. 174, 184, this Court held that:

> "Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted."

Mr. Justice Frankfurter's dissenting opinion also stated that:

> "We are all agreed that a State must subordinate its policies to the constitutional powers duly exercised by the United States" (322 U. S. 195).

In *S. R. A.* v. *Minnesota, supra*, 327 U. S. 558, the Court rejected a "too mechanical" rule (327 U. S. 569); and also held that the meaning and effect of contracts to which the United States is a party "must be finally determined by this Court" (327 U. S. 564).

In *United States* v. *County of Allegheny, supra*, 322 U. S. 174, 183, this Court held that, in such cases, "we do not think the state law would be decisive of the question of title" (322 U. S. 182), and that:

> "The purpose of the supremacy clause was to avoid

> flicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state" (322 U. S. 183).

Hence, "policies so settled under federal authority may not be defeated or limited by state law" (322 U. S. 183).

There is a "long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest" (*Kern-Limerick Inc.* v. *Scurlock*, 1954, 347 U. S. 110, 121, and cases cited in footnote 11). As said in *Case* v. *Bowles*, 1946, 327 U. S. 92, 102:

> "Congress has power in order to attain a legitimate end—that is, to accomplish the full purpose of a granted authority—to use all appropriate means plainly adapted to that end, unless inconsistent with other parts of the Constitution. . . .
>
> Where, as here, Congress has enacted legislation authorized by its granted powers, and where at the same time, a state has a conflicting law which but for the Congressional Act would be valid, the Constitution marks the course for courts to follow. Article VI provides that 'The Constitution and the Laws of the United States . . . made in Pursuance thereof . . . shall be the supreme Law of the Land' " (327 U. S. 102-103).

The power of Congress in order to attain the legitimate end and accomplish the full purpose of affording aid to local governments, by making and severing from Government property a "lessee's interest" with option to buy, and making it subject in private hands to local taxation, includes, of course, the power to use as appropriate means to that end the existing local governments and their boards of assessors, as well as any State law or procedure which may be adopted

part of the Congressional program and are to be liberally construed to accomplish the full purpose of Congress and to prevent rather than occasion its defeat.

If § 3 and § 4 of the New York Tax Law (Appendix, infra, pp. 27, 28) be read as either containing or as supplemented by 34 U. S. C. A. § 522e, every argument of Grumman or of the Court of Appeals majority is dissipated. After Congress exercised its plenary power under Art. 4, § 3, cl. 2 and Art. 1, § 8, cl. 18 of the Constitution by enacting 34 U. S. C. A. § 522e, even the State legislature could not nullify this by providing, for example, that the "lessee's interest" made or created under the Act of Congress shall "*not*" be subject to State or local taxation. There is, however, no such nullifying State legislation. The Court of Appeals majority decision itself introduces the nullifying "disparities, confusions and conflicts" (322 U. S. 183) which it was the purpose of the supremacy clause to avoid. The Court of Appeals majority decision, by its unwarranted strict and extraordinary construction of preexisting State Law, defeats the power of Congress "to accomplish the full purpose of a granted authority" (327 U. S. 102), where even the State legislature would have no power to do so.

While petitions to this Court in tax cases are usually by taxpayers, this Court also reviews tax cases on petition of a State (*Alabama* v. *King & Boozer*, 1941, 314 U. S. 1) or municipal corporation (*City of New Brunswick* v. *United States*, 1928, 276 U. S. 547).

CONCLUSION

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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Counsel for Petitioners.

CHARLES A. ELLIS,

APPENDIX

APPENDIX

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES:

Art. 4, § 3, cl. 2:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; . . ."

Art. 1, § 8, cl. 18:

> "The Congress shall have Power . . .
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Art. 6, cl. 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

ACT OF AUGUST 5, 1947, c. 493, § 1, 61 Stat. 774, amended September 28, 1951, c. 434, Title VI, § 605, 65 Stat. 366, 34 U. S. C. A. § 522a; and § 6, 61 stat. 775, 34 U. S. C. A. 522e:

> "§ 522a. Lease of real or personal property; period of lease; terms and conditions; revocation; disposition of receipts; report to Congress.
>
> Whenever the Secretary of the Navy shall deem it to be advantageous to the Government he is authorized to lease such real or personal property under the

control of his Department as is not surplus to the needs of the Department within the meaning of the Act of October 3, 1944 (58 Stat. 756) and is not for the time required for public use, to such lessee or lessees and upon such terms and conditions as in his judgment will promote the national defense or will be in the public interest. Each such lease shall be for a period not exceeding five years unless the Secretary shall determine that a longer period will promote the national defense or will be in the public interest. The Secretary may include, among other terms and conditions in the lease, a right of first refusal in the lessee to purchase the property in the event of the revocation of the lease in order to permit sale thereof by the Government, but this section shall not be construed as authorizing the sale of any property unless the sale thereof is otherwise authorized by law. Each such lease shall contain a provision permitting the Secretary to revoke the lease at any time, unless the Secretary shall determine that the omission of such provision from the lease will promote the national defense or will be in the public interest. In any event each such lease shall be revocable by the Secretary during a national emergency declared by the President. Notwithstanding section 303b of title 40, or any other provision of law, any such lease may provide for the maintenance, protection, repair, or restoration by the lessee, of the property leased or of the entire unit or installation where a substantial part thereof is leased, as a part or all of the consideration for the lease of such property. In the event utilities or services shall be furnished by the Department to the lessee in connection with any lease, payments for utilities or services so furnished may be covered into the Treasury to the credit of the appropriation or appropriations from which the costs of furnishing any such utilities or services to the lessee was paid. Except as otherwise hereinabove provided, any money rentals received by the Government directly under any such lease shall be deposited and covered into the Treasury as miscellaneous receipts. The authority herein granted shall not apply to oil, mineral, or phosphate lands."

"§ 522e. Lease of real or personal property; State or local taxation; renegotiation of leases

The lessee's interest, made or created pursuant to the provisions of sections 522a-522e and 522e of this title, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of said sections shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

NEW YORK TAX LAW, § 3, and § 4, pars. 1 and 17; 59 McKinney's Consolidated Laws of New York, Part 1, § 3 and § 4, pars. 1 and 17:

"§ 3. Property liable to taxation

All real property within the state is taxable unless exempt from taxation by law. Notwithstanding any provision of any other law, property used or occupied by a railroad for purposes of railroad operation, title to which is in the state of New York or in any municipal corporation thereof under any of the grade crossing elimination acts, shall be deemed property of the railroad for purposes of taxation and shall be assessed and taxed in the same manner and to the same extent as if such railroad were the owner thereof. Notwithstanding any provision of this chapter, or of any other general, special or local law to the contrary, personal property, whether tangible or intangible, shall not be liable to taxation locally for state or local purposes. As used in this section, the term 'personal property,' in its application to the property of corporations taxable under article nine-a of this chapter, shall include any movable machinery and equipment used for trade or manufacture and not essential for the support of the building, structure or superstructure, and removable without material injury thereto and shall not include boilers, ventilating apparatus, elevators, plumbing, heating, lighting and power generating apparatus, shafting other than

counter-shafting, equipment for the distribution of heat, light, power, gases and liquids, nor any equipment consisting of structures or erections to the operation of which machinery is not essential. An owner of a building is entitled to the same exemption under this section as a lessee. As amended L. 1933, c. 470, § 1; L. 1944, c. 415, § 7; L. 1945, c. 278, eff. March 27, 1945."

"§ 4. Exemption from taxation

The following property shall be exempt from taxation:

1. Property of the United States except property subject to taxation under the constitution and laws of the United States.

• • •

17. Whenever the legal title of real property is in the United States or in this state, but the use, occupation or possession thereof is in a corporation, association, co-partnership or individual, or its or his successor in interest, under a contract of sale or other agreement whereby upon certain payment or payments the legal title is to be or may be acquired by such corporation, association, co-partnership or individual, his or its interest in such real property shall be assessed and taxed as real property subject to the provisions of this subdivision. The interest of the United States, or of this state, in such property shall not be assessed or taxed and the assessing and taxing officers shall add to the assessment and tax rolls opposite the description of any such property a notation stating that such interest is not assessed or taxed; and every notice of sale or other process and every conveyance or other instrument affecting the title to any such property, consequent upon the nonpayment of any such tax, shall contain a statement that such interest is not sold or to be sold or affected. The interest in any such property of the corporation, association, co-partnership or individual, which or who is in the use, occupation or possession thereof, shall be assessed and taxed in the same manner as if

said corporation, association, co-partnership or individual held the legal title to such property, except for the addition to the description of the words 'interest under contract,' or other appropriate words descriptive of the interest in the property so assessed. Such assessment shall be at the full value of such property without deduction therefrom on account of the whole or any part of the purchase price, or other sum due on such property, remaining unpaid. The classification of such property or any part thereof as real property for the purposes of taxation under this chapter shall not be affected by any provision of the contract or agreement under which the same is held."

Decision—Opinion of Hogan, J.

Dated December 7, 1955

SUPREME COURT

SUFFOLK COUNTY

[SAME TITLE]

Petitioner has instituted a proceeding under Article 13 of the Tax Law to review and strike from the rolls the assessments made against it on the 1955-56 assessment roll of the Town of Riverhead, covering its alleged interest in certain real property lying in said Town, owned by the United States but occupied by petitioner under a lease. Upon the return of said petition, the respondent moved that it be dismissed upon the ground that it failed to state facts sufficient to warrant such relief.

It is the petitioner's contention that it has absolutely no assessable or taxable interest whatsoever in the property involved. The Court is called upon to determine whether the "Supplemental Facilities Agreement" between the petitioner and the United States of America brings it within the operation of Section 4, Subdivision 17 of the Tax Law of the State of New York, which statute directs the taxation of the interest of a corporation in real property held under an agreement, "* * * whereby upon certain payment or payments, the legal title is to be or may be acquired by such corporation * * *".

The Supplemental Facilities Agreement was entered into on August 26, 1954, under the authority of Title 34, Section 522 (a) of the United States Code. In form it is a lease of certain land and improvements owned by the Government, lying in the Towns of Riverhead and Brookhaven, and constituting the Naval Industrial Reserve Aircraft Plant; D. O. D. No. 466.

Article X thereof is entitled "Improvements, Mobilization and Option to Purchase" and reads as follows:

> "ARTICLE X—IMPROVEMENTS, MOBILIZATION AND OPTION TO PURCHASE.
>
> "(a) In the event that the Facilities are determined to be excess to the further needs and responsibilities of the Department, and the Department elects to terminate this lease in accordance with the provisions of paragraph (d) of Article VII hereof, the Lessee shall have an option, which may be exercised by notice of intention to purchase delivered to the Department at any time during a period of ninety (90) days after receipt of notice of termination, to purchase the Facilities at their original cost to the Government less depreciation on improvements (exclusive of improvements financed by Lessee) at the rate of 3% per annum from the date of completion of the Facilities to the date notice of Lessee's intention to exercise such option is received by the Government. Sale of the facilities to the Lessee shall, however, be subject to the Department obtaining all necessary authorizations and approvals required to enable it to sell the Facilities to the Lessee.
>
> "(b) In the event Lessee purchases the Facilities in accordance with paragraph (a) hereof, the Lessee hereby covenants and agrees that, for a period of twenty (20) years from the date of the deed which effects a transfer of said Facilities to the Lessee, it will maintain said Facilities in such condition that they will at all times be capable of producing military aircraft for the department within thirty (30) days after receipt by Lessee of a mobilization notice from the Department; and Lessee further agrees that such covenant may, at the option of the Department, be made a part of the deed of conveyance from the Government.
>
> "(c) The Lessee hereby covenants and agrees that, subject to and in accordance with the provisions of Article XI hereof, it will, within five (5) years from the date hereof, expend not less than $1,000,000

> for the construction of additional buildings, structures or other improvements to the Facilities. In the event that this lease is terminated by either party prior to the expiration of the first five year term hereof, then the provisions of this paragraph (c) shall be of no force and effect; *provided, however*, that if this lease is terminated during the first term hereof and the Facilities are sold to the Lessee in accordance with the provisions of paragraph (a) of this Article and Lessee at the date of the sale has not expended $1,000,000 for the construction of additional buildings, structures or other improvements to the Facilities, then the deed of conveyance to Grumman Aircraft Engineering Corporation shall contain a covenant on the part of Grumman Aircraft Engineering Corporation to carry out the provisions of this paragraph (c).

It should be noted that the lessee is not granted an absolute option, but merely a right of first refusal when *and if* the Government elects to terminate the lease, and when and if the Navy Department obtains all necessary authorizations and approvals. These "necessary authorizations and approvals" have been described to the Court by petitioner's counsel as follows:

> "* * * when a department that has jurisdiction of the property finds out that it is excess to its needs, it is then circulated amongst other departments of the government to see whether they have any use for it, and if none of them has any use for it, it then goes to the General Services Administration, which may dispose of it and usually disposes of it by referring it back to the department which had original jurisdiction and allows them to dispose of it."

What the petitioner has, therefore, is simply a lease with a right of first refusal in the event that the landlord elects to, and can sell the leased premises.

The Congress of the United States has permitted State and local governments to tax such leases by enacting, in

1947, Section 522e, Title 34, of the United States Code, which provides that:

> § 522 (e) Lease of Real or Personal Property: State or Local Taxation: Renegotiation of Leases.
>
> "The lessee's interest, made or created pursuant to the provisions of sections 522a—522c and 522e of this title, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of said sections shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

In those states which permit the taxation of personal property, such a lease, as well as the conditional option, could be assessed and taxed without further ado. In New York, on the other hand, it is provided that "* * * personal property, whether tangible or intangible, shall not be liable to taxation locally for State or local purposes." (Tax Law, Sec. 3)

It is fundamental, however, that the Legislature may classify property for tax purposes in any manner it deems proper (Peo. ex rel. Holmes Electric Protective Service Co. v. Chambers, 125 N. Y. S. (2d) 436). Has it classified the interest of this petitioner arising under the Supplemental Facilities Agreement in such manner as to make it taxable? Such classification, if in fact it has been made, must be found in the aforesaid Section 4, subd. 17 of the Tax Law. This subdivision was enacted in 1925, twenty-two years *prior* to the partial relinquishment by the United States of its sovereign right to exemption from State and Local taxation (U. S. C. Title 34, Sec. 522 (e), supra). Its pertinent provisions read as follows:

> "Whenever the legal title of real property is in the United States * * *, but the use, occupation or

> possession thereof is in a corporation * * * or its * * * successor in interest, under a contract of sale or other agreement whereby upon certain payment or payments, the legal title is to be or may be acquired by such corporation * * *, its interest in such real property shall be assessed and taxed as real property subject to the provisions of this subdivision * * *. The interest in any such property of the corporation * * * which * * * is in the use, occupation or possession thereof, shall be assessed and taxed in the same manner as if said corporation * * * held the legal title to such property, except for the addition to the description of the words, descriptive of the interest in the property so assessed. *Such assessment shall be at the full value of such property without deduction therefrom on account of the whole or any part of the purchase price, or other sum due on such property, remaining unpaid* * * *".

Was the Statute designed to make taxable an interest such as this petitioner's or was it intended only to reach a *vendee in possession* under an executory agreement of sale, one who was the equitable owner of the premises but who would not receive legal title until a final payment had been made?

It is to be interpreted in the light of the principle that "A statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax." (Good Humor Corp. v. McGoldrick, 289 N. Y. 452, 455; See also RKO-Keith-Orpheum Theatres, Inc. v. City of New York, 285 App. Div. 374), and Chief Justice Conway of the Court of Appeals said, in the case of American Locker Co. v. City of New York, 308 N. Y. 264:

> "Moreover, it was well said in Gould v. Gould (245 U. S. 151, 153): 'In the interpretation of stat-

> utes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen. United States v. Wigglesworth, 2 Story, 369; American Net & Twine Co. v. Worthington, 141 U. S. 468, 474; Benziger v. United States, 192 U. S. 38, 55". (See, also, Matter of Holmes Elec. Protective Co. v. McGoldrick, 262 App. Div. 514, affd. 288 N. Y. 635; Matter of Brooklyn Union Gas Co. v. McGoldrick, 270 App. Div. 186, 195, affd. 298 N. Y. 536; Matter of Good Humor Corp. v. McGoldrick, 289 N. Y. 452)"

The mandate of the Statute is that the assessment shall be at the *full value of the property*, without deduction for the unpaid portion of the purchase price. Such language hardly indicates an intent to confer upon a local taxing authority the power to impose upon a lessee under a five year tenure, terminable at the will of the landlord, a tax *based upon the full value of the leased property*, merely because the lease contains a right of first refusal when and if the landlord decides to sell. The Act does not provide for an assessment at the value of the lessee's interest in the property, but for an assessment "at the full value" of *the property itself*.

Even if there were a reasonable doubt as to the effect of this language, it would have to be construed in favor of the taxpayer (Dun & Bradstreet v. City of New York, 276 N. Y. 198, 204).

The respondent has offered several decisions which, it claims, support its position. In S. R. A., Inc. v. Minnesota, 327 U. S. 558, the corporation was occupying the premises sought to be taxed under an *executory contract of sale*, under which it had obtained an equitable interest which would indefeasibly ripen into legal title when and if it

completed the payments on account of the purchase price. Instead of passing title subject to a purchase money mortgage, the vendor (the United States) permitted the vendee to occupy the premises, but retained title until payments were completed. It was held that the State of Minnesota could tax the vendee's equitable interest, so long as the right of the United States to repossess upon default remained paramount. The case at bar is clearly distinguishable by reason of the fact that this petitioner has no equitable ownership, nor even an absolute right to acquire ownership—under an agreement of sale, but merely a right of first refusal *if* the owner should decide to sell.

In U. S. v. Woodworth, 66 Federal Supp. 641, it was held that Government owned property (in the State of New York to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds as a bailee. The Court added the following statement by way of dictum:

> "The City and County did not undertake to levy taxes upon the interests of Eastman Kodak Company and Bausch & Lomb Optical Company (leases with conditional options to purchase from the United States) as they might possibly have done under Section 4, subdivision 17 of the tax law, if the interests of said corporations, as defendants contend, amounted to an interest 'under a contract of sale or other agreement whereby upon certain payment or payments, the legal title is to be or may be acquired by such corporation * * *'."

This is far from holding that such interests were, in fact, taxable.

In Dayton Development Fort Hamilton Corp. v. Boyland, 133 N. Y. S. (2d) 831, decided by Mr. Justice Ughetta, the United States leased real property in the City of New York to petitioners for a term of 75 years for the purpose of

erecting housing units thereon. The lease further provided that title to all improvements constructed upon the premises by the lessees should remain in them, and that they might elect to remove such improvements upon the termination of the lease. These two circumstances, i.e., the 75 year term and the retention of title to improvements apparently formed the basis for the imposition of a real estate tax. The petitioner in the case at bar has no title of any nature to the improvements.

In People ex rel. Mergenthaler v. Mills, not reported, but affirmed 281 App. Div. 167, Mr. Justice Ughetta held that where the petitioner leased real property from the Defense Plant Corporation, one of the terms of the lease being that the lessee agreed to pay all taxes on it or upon the Defense Plant Corporation, and another being that the lessee could include the amount so paid in the price it charged the United States for its height finders, and where, concededly, the Defense Plant Corporation was not vested with tax exemption, the fact that the United States, through delay or administrative oversight, failed to convey legal title to the Defense Plant Corporation for the first years of the lease, was no ground for exempting the petitioner from local taxation. To base exemption on such a mere technicality, he said, would be to exault form over substance.

Alabama v. King & Boozer, 314 U. S. 1, is authority only for the principle that when one contracts to sell or to manufacture for the United States Government on a "cost-plus" basis, the fact that any tax imposed upon the contractor will be paid indirectly by the United States, is no ground for exempting the contractor from taxation.

The Legislature may, if it sees fit, make this type of leasehold subject to local taxation at its fair value. The impact of a large operation such as this petitioner's, accompanied by an influx of hundreds of workers and their

families, can result in great and sudden hardship to an established community or school district. But until the Legislature does so in plain and unequivocal language, the Court is constrained to apply the aforesaid statutory rules of construction to existing legislation, and to find that the tax sought to be imposed is unauthorized. Respondent's motion to dismiss the petition under Article 13 of the Tax Law accordingly, is denied. The petition is sustained and respondent will be directed to remove from its tax rolls, the assessments set forth therein.

HOWARD T. HOGAN
J. S. C.

Opinion of Reversal

[Same Title]

In a proceeding under article 13 of the Tax Law to review tax assessments, the appeal is from an order denying a motion to dismiss the petition for insufficiency, finding that the assessments are illegal, and directing appellants and all tax officials having jurisdiction thereof to strike the assessment from the assessment roll for the year 1955-1956. Title to the property was in the United States. Appellants based the assessment upon subdivision 17 of section 4 of the Tax Law which provides that where legal title to real property is in the United States, a tax assessment may be levied against the interest of an occupant or possessor thereof under an agreement whereby upon certain payment or payments legal title may be acquired by the occupant. The respondent was in possession under a lease containing an option to buy at a certain price in the event that the lessor, pursuant to other provisions of the lease, elected to terminate the lease and dispose of the property as surplus. The order appealed from is based upon the determination that the statute involved applies only to a holder of equitable title in possession of property. Order reversed, without costs, and motion granted. The statute applies to an occupant in possession under any agreement whereby he may, upon certain payments, acquire legal title. The leasehold interest, including the option to buy at a certain price and under certain conditions, is a taxable interest under the statute. Beldock, Murphy, Ughetta and Kleinfeld, JJ., concur. Wenzel, Acting P.J., dissents and votes to affirm with the following memorandum: Real property owned by the United States and in possession of a vendee under an executory contract of sale is taxable as real property. (Tax Law, sec. 4, subdiv. 17; 68 N. Y. St. Dept. Rep. 425; S. R. A., Inc. v. Minnesota, 327 U. S. 558). The ownership by the

United States would not bar local taxation of respondent's interest if the New York statutes made any provision for taxing such interest (U. S. Code, tit. 34, sec. 522e). Inter alia, the lease authorized the lessor to terminate the lease at any time during a declared national emergency or on ninety days' notice by the Secretary of the Navy whenever he determines that the interests of national defense so require. No title to the real property, legal or equitable, was in the respondent. It did not own the buildings nor did it have the right to remove them. The United States did not hold merely a naked legal title and a nominal interest (see e. g., United States v. Allegheny County, 322 U. S. 174, 187). Such interest as the respondent had was not taxable as real property (People ex rel. Int. Navigation Co. v. Barker, 153 N. Y. 98; People ex rel. Hudson River Day Line v. Franck, 257 N. Y. 69; 1949 Atty. Gen. 90; cf. People ex rel. Muller v. Board of Assessors, 93 N. Y. 308, and Dayton Development Ft. Hamilton Corp. v. Boyland, 133 N. Y. S. 2d, 831, aff'd — App. Div. 2d, —, Second Dept., decided April 30, 1956; see e. g., Matter of Althause, 63 App. Div. 252, aff'd 168 N. Y., 670).

Opinions in New York Court of Appeals

Decided March 8, 1957.

COURT OF APPEALS

STATE OF NEW YORK

[SAME TITLE]

DYE, J. The Grumman Aircraft Engineering Corporation, hereinafter called Grumman, instituted this special proceeding under article 13 of the Tax Law against the Assessors of the Town of Riverhead, Suffolk County, New York, hereinafter called Assessors, for an order striking from its assessment rolls an assessment made against Grumman's alleged interest in real property lying in said town and leased by it from the United States, hereinafter called Government, on the ground that such leasehold interest is not subject to assessment and tax within the provisions of the State Tax Law. Grumman now appeals as of right from an order of the Appellate Division, Second Department, which reversed an order of the Supreme Court, Suffolk County, denying respondents' motion to dismiss Grumman's petition for insufficiency, and dismissed the petition.

Under date of January 23, 1952, Grumman made a contract with the Government known as Facilities Contract N60a-1151, which, in brief, dealt with the acquisition of machine equipment and tools and the design, layout and construction of what is now known as the Naval Industrial Reserve Aircraft Plant at Calverton, Suffolk County, New York. This was under the direction of the Secretary of the Navy. The construction work cost the Government about $23,500,000. In addition, Grumman contributed engineering, design and supervisory work amounting to $2,356,112 or a total cost of $25,856,112 for the completed facility.

Upon completion of the work, the Government leased the whole facility to Grumman by written lease dated April 1

1954 for a term of five years ending March 31, 1959, with the right of renewal on the same terms at the option of the tenant for two successive five-year periods, the rental, however, for the latter periods being subject to renegotiation prior to the commencement of such renewal or extended term. Various other terms and conditions are dealt with which need not be mentioned except to call attention to the lease provision dealing with termination before the end of the term when and if the Secretary determines the facilities or a major portion thereof are excess to the further needs of the Navy Department (art. VII, par. [d])[1] and, if so terminated, the tenant's option to purchase (art. X, par. [a])[2].

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[1] "Upon ninety (90) days written notice to the Lessee that Secretary has determined that the Facilities, or the major portion thereof, are excess to the further needs and responsibilities of the Department: *provided, however*, that if, within such ninety (90) day period, the Lessee shall notify the Department of its intention to exercise the right to purchase the Facilities as provided in Article X hereof, termination of this lease pursuant to this paragraph (d) shall not become effective unless and until the Department shall have obtained all necessary authorizations and approvals required to effectuate such sale to the Lessee and shall have notified Lessee that it has obtained such necessary authorizations and approvals."

[2] "(a) In the event that the Facilities are determined to be excess to the further needs and responsibilities of the Department, and the Department elects to terminate this lease in accordance with the provisions of paragraph (d) of Article VII hereof, the Lessee shall have an option, which may be exercised by notice of intention, to purchase delivered to the Department at any time during a period of ninety (90) days after receipt of notice of termination, to purchase the Facilities at their original cost to the Government less depreciation on improvements (exclusive of improvements financed by Lessee) at the rate of 3% per annum from the date of completion of the Facilities to the date notice of Lessee's intention to exercise such option is received by the Government. Sale of the facilities to the Lessee shall, however, be subject to the Department obtaining all necessary authorizations and approvals required to enable it to sell the Facilities to the Lessee."

The assessments complained of were levied pursuant to provisions of subdivision 17 of section 4 of the Tax Law[3] and in reliance on a waiver of immunity as contained in Federal Statute (U. S. Code, tit. 34, §§ 522a, 522c, 522e)[4] as follows:

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[3] Insofar as pertinent, subdivision 17 of section 4 of the Tax Law provides:

"17. Whenever the legal title of real property is in the United States or in this state, but the use, occupation or possession thereof is in a corporation, association, co-partnership or individual, or its or his successor in interest, *under a contract of sale or other agreement whereby upon certain payment or payments the legal title is to be or may be acquired by such corporation, association, co-partnership or individual*, his or its interest in such real property shall be assessed and taxed as real property subject to the provisions of this subdivision. The interest of the United States, or of this state, in such property shall not be assessed or taxed * * *. The interest in any such property of the corporation * * * shall be assessed and taxed in the same manner as if said corporation * * * held the legal title to such property, except for the addition to the description of the words 'interest under contract,' or other appropriate words descriptive of the interest in the property so assessed. Such assessment shall be at the full value of such property without deduction therefrom on account of the whole or any part of the purchase price, or other sum due on such property, remaining unpaid. The classification of such property or any part thereof as real property for the purposes of taxation under this chapter shall not be affected by any provision of the contract or agreement under which the same is held." (Emphasis supplied. This section was formerly § 24, as added by L. 1925, ch. 99, and was renum. 17 by L. 1933, ch. 470, eff. June 30, 1933. Former subd. 17 was repealed by L. 1933, ch. 470, § 9, and was derived from Tax Law of 1896, L. 1896, ch. 908, § 4.)

[4] "§ 522e. Lease of real or personal property; State or local taxation; renegotiation of leases.

"The lessee's interest, made or created pursuant to the provisions of sections 522a-522c and 522e of this title, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of said sections shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms

(Footnote continued on next page).

1955-1956	$ 743,100
For amount omitted from 1954 tax roll	496,000
TOTAL	$1,239,100[5]

The petitioner-appellant challenges the validity of such assessments (1) for lack of statutory authority; (2) if deemed authorized by subdivision 17 of section 4 of the Tax Law, then such statute is constitutionally invalid as viola-

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of such lease shall be renegotiated." (Aug. 5, 1947, ch. 493, § 6, 61 U. S. Stat. 775. Repealed by Act Aug. 10, 1956, ch. 1041, § 53, 70A U. S. Stat. 611, 677, U. S. Code, tit. 10, Armed Forces, § 2667. Substantially re-enacted with changes appropriate to the various departments of the armed forces as U. S. Code, tit. 10, Armed Forces, § 2667.) Subdivision (e) thereof provides:

"(e) The interest of a lessee of property leased under this section may be taxed by State or local governments. A lease under this section shall provide that, if and to the extent that the leased property is later made taxable by State or local governments under an act of Congress, the lease shall be renegotiated."

[5] The method of evaluation apparently employed to reach the 1955-1956 amount of $743,100 is described in Exhibit B as follows:

"1. Loss by petitioner on acreage sold to the U. S. Govt.	1,052.00
2. Cost of engineering survey made at petitioner's expense prior to contract with U. S. Government for establishment of Facilities	5,060.00
3. 10% of the cost of constructing improvements on Government property at Government expense on the theory that petitioner contributed services worth 10% in supervising the several contracts involved	2,350,000.00
Total	$2,356,112.00
With a deduction for property in another town, and 'equalizing' the assessment at 33⅓, the total assessed value for the Town of Riverhead is	$ 743,100.00"

tive of the immunity of the Federal Government from taxation by the States (*United States* v. *County of Allegheny*, 322 U. S. 174); and (3) that, in any event, the petition should not have been dismissed but, instead, remanded to the Supreme Court, Suffolk County, for further proceedings.

The Special Term sustained the petitioner's objections and granted an order directing the Assessors to remove the assessment from its tax rolls. This ruling was on the theory that Grumman's interest in the facilities, at best, was personalty, and—as such—not liable to assessment and tax as real property (Tax Law, § 3). Upon appeal, the Appellate Division took a contrary view, reversed the order and dismissed the petition on the ground that Grumman's interest was taxable within the meaning of subdivision 17 of section 4 of the Tax Law.

Initially let it be said that Grumman does not assert that it is exempt from taxation. Its assertion is that it has no interest in the subject premises, otherwise immune from taxation, which can be said to fall within the purview of any tax statute.

In New York, all real property within the State is taxable unless specially exempt by law (Tax Law, § 3). Property of the United States is exempt unless made subject to taxation under the Constitution and laws of the United States (Tax Law, § 4, subd. 1). On the other hand, personal property—whether tangible or intangible—is not liable to taxation locally for State or local purposes (Tax Law, § 3). Although it is fundamental that the Legislature may classify property for tax purposes in any manner it deems proper (*People ex rel. Hudson Riv. Day Line* v. *Franck*, 257 N. Y. 69), its power in that regard is not without limitation, for the classification must have some reasonable basis (*People ex rel. Farrington* v. *Mensching*, 187 N. Y. 8). It is significant to note that nowhere in the Tax Law has the Legislature characterized a leasehold as tax-

able real property. Such omission is understandable, as a lease for years is deemed personalty (*Matter of Althause*, 63 App. Div. 252, affd. without opinion 168 N. Y. 670; *Fifth Ave. Bldg. Co. v. Kernochan*, 221 N. Y. 370; *First Trust & Deposit Co. v. Sprdelco, Inc.*, 249 App. Div. 285; *Matter of Ehrsam v. City of Utica*, 37 App. Div. 272; Restatement, Property, § 8; 1949 Atty. Gen. 90, 91). We do not read subdivision 17 of section 4 of the Tax Law as changing this basic concept.

Subdivision 17 of section 4 of the Tax Law was enacted following our decision in *People ex rel. Donner-Union Coke Corp. v. Burke* (204 App. Div. 557, affd. without opinion 236 N. Y. 650). In that case, the Donner Company was in possession of the plant which it had purchased from the United States Government under an executory contract of sale, the Government retaining the legal title as security analogous to a mortgage. We struck down an assessment against Donner on the theory that, to apply the principle that a vendee in possession of real property under an executory contract of sale is to be regarded as the owner for purposes of taxation, might cause embarrassment to the title of the United States in the event of a tax sale. It was the illegality of such assessment which the Legislature sought to cure by enacting subdivision 17 of section 4 (see *People ex rel. Donner-Hanna Coke Corp. v. Burke*, 248 N. Y. 507).

Grumman is not in the same position as Donner. It is not in possession under an executory contract of purchase as was Donner, but is in possession under a long-term lease which casts the parties in the relationship of landlord and tenant. Under the lease, the Government retains legal title, not as an equitable mortgagee, but as an owner in fee—together with all rights of ownership—including the right to terminate the lease at will. Nothing in the lease is tantamount to an equitable ownership such as is contemplated by the statute. According to the lease, Grumman has no

more than an option "to purchase the Facilities at their original cost to the Government less depreciation" (art. X, subd. [a]—for full text, see Note 2 above, p. 504) which, however, may not be exercised until after 90 days' written notice to the lessee that "the Secretary has determined that the Facilities, or the major portion thereof, are excess to the further needs and responsibilities of the Department: *provided, however*, that if, within such ninety (90) day period, the Lessee shall notify the Department of its intention to exercise the right to purchase the Facilities as provided in Article X hereof, termination of this lease * * * shall not become effective unless and until the Department shall have obtained all necessary authorizations and approvals required to effectuate such sale * * * and shall have notified Lessee that it has obtained such necessary authorizations and approvals" (art. VII; for full text see Note 1 above, p. 504).

When this so-called option is read in its most favorable light, it confers upon the lessee nothing more than a right of first refusal to purchase the facilities at a price to be fixed at the time and conditioned upon a variety of circumstances that only affirmative action of the secretary can bring to pass—and even then—it is subject at all times to the secretary's having obtained "all necessary authorizations or approvals". Until these prerequisite conditions are met, the lessee is in no position to exercise its right of first refusal. Grumman's connection with the property will come to an end at the termination of the lease. Since Grumman is under no obligation to purchase the property and in no position to bring about an opportunity in which to exercise its right of first refusal, it cannot be said, as matter of fact or as matter of law, that Grumman is a vendee in possession under an executory contract of purchase. So viewed, Grumman has no interest in the facilities subject to assessment and taxation within the meaning of subdivision 17 of section 4. It is only when the Government holds

a bare legal title analogous to a mortgage that the immunity of the United States no longer attaches (Tax Law, § 4, subd. 1). When such is the case, the assessment for taxation "shall be at the full value of such property without deduction", the same as if the legal title were held by the vendee (Tax Law, § 4, subd. 17). Nothing in subdivision 17 of section 4 conflicts with Federal law. As we read section 522e of title 34 of the United States Code (Note 4 above, p. 505), the United States has consented to a waiver of its immunity from taxation to the extent of permitting local taxation of a lessee's interest in Government property. The Federal statute is, however, permissive only and no tax is possible unless local law authorizes and provides for it. Since subdivision 17 of section 4 authorizes the assessment of the interest of the party in possession "in the same manner as if" it "held the legal title" to the property owned by the United States and that it be assessed "at the full value of such property", the question arises whether this section is void because it disregards and exceeds the limited nature of the United States Government's waiver which extends only to the "lessee's interest". The answer to that question is to be found in *United States* v. *County of Allegheny*, (322 U. S. 174, 187-189, *supra*), wherein the court said:

> "We have held that where private interests in property were so preponderant that all the Government held was a naked title and a nominal interest, the whole value was taxable to the equitable owner. *Northern Pacific Ry. Co.* v. *Myers*, 172 U. S. 589; *New Brunswick* v. *United States*, 276 U. S. 547. But that is not the situation here, and the State has made no effort to segregate Mesta's interest and tax it. The full value of the property, including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in Mesta's assessment. * * *
>
> "We hold that Government-owned property, to the full extent of the Government's interest therein,

is immune from taxation, either as against the Government itself or as against one who holds it as a bailee."

In the case before us, the respondents attempt to circumvent subdivision 1 of section 4 of the Tax Law which prevents the taxing of property of the United States, by categorizing the assessment as being on "interest under contract with U. S. of 4 1 54" and adding that "The interest of the United States or of this State in the foregoing property is not assessed or taxed". In so doing, they have disregarded the mandatory language of subdivision 17 of section 4 of the Tax Law, which provides that where taxable, the tax shall be "at the full value of such property". Respondents' reasoning to the effect that Grumman's services in supervising the construction of the Government buildings which Grumman subsequently leased from the Government (valued by respondents at $2,350,000) constituted real property taxable to Grumman, is unconvincing. There is no proof that such expenditures by Grumman gave it any right of ownership in the buildings, the construction of which they supervised. More reasonable is the assumption that such expenditures by Grumman were in the nature of additional rent, since nowhere is it provided that such amounts are to be reimbursed on termination or applied on the purchase price if, as and when Grumman has an opportunity to exercise its right of refusal.

The assessment and tax are, therefore, even if considered as authorized by subdivision 17 of section 4, either illegal because not made in conformity with the dictates of that section with respect to valuation, or, if considered as made at the full value of the property, void for lack of consent by the United States.

In dealing with the applicability of tax statutes, it is a basic rule not "to extend their provisions, by implication, beyond the clear import of the language used" (*American*

Locker Co. v. *City of New York*, 308 N. Y. 264, 269). In case of doubt, they are to be construed more strongly against the Government and in favor of the citizen (*Gould* v. *Gould*, 245 U. S. 151, 153; *Matter of Good Humor Corp.* v. *McGoldrick*, 289 N. Y. 452).

Finally, by way of summary, Grumman is not seeking an exemption from taxation. The property is not taxable by virtue of the overriding immunity of the United States Government as owner. It is the local government which is attempting to levy a tax where the property is already immune from taxation under a statute that has no application to the present situation. We are not dealing with an executory agreement whereby upon a certain payment or payments the legal title may be acquired. This agreement imposes a variety of other conditions besides "certain payment or payments."

Since we deem the assessment illegal *ab initio*, it is unnecessary to consider the question whether the petition by Grumman for review of the assessment should have been remanded for further proceedings.

The order of the Appellate Division should be reversed and that of the Supreme Court, Suffolk County, ordering the assessment stricken, affirmed, with costs in all courts.

Fuld, J. (dissenting). To see this case in proper perspective and, indeed, to envision the consequences of decision herein, it should be noted at the outset that we are concerned with a vast tract of real property in the Town of Riverhead, of over 4,400 acres, owned by the United States Government and occupied and used by the petitioner Grumman under an agreement with the government. If the property were owned by anyone but the United States (or the State of New York), it would concededly be subject to assessment and tax (Tax Law, § 4, subd. 17). Moreover, Congress actually passed a law expressly providing that

such an interest as that which Grumman obtained from the government, and which it now enjoys, "shall be made subject to State or local taxation" (U. S. Code, tit. 34, § 522e, also, §§ 522a-522c; these sections were repealed in 1956 and § 522e substantially re-enacted as § 2667, subd. [e] of tit. 10).

The sole question presented, therefore, is whether the Tax Law of this state provides for the assessment and taxation of Grumman's interest in such real property, and, it seems to me, a reading of subdivision 17 of section 4 of that statute compels an affirmative answer. In so many words, the legislature has provided that,

> "Whenever the legal title of real property is in the United States or in this state, but the use, occupation or possession thereof is in a corporation, association, co-partnership or individual * * * under a contract of sale or other agreement whereby upon certain payment or payments the legal title * * * may be acquired by such corporation, association, co-partnership or individual, his or its interest in such real property shall be assessed and taxed as real property".

The subdivision further provides that the interest of the corporation, "in the use, occupation or possession" of such property, "shall be assessed and taxed in the same manner as if [it] * * * held the legal title to such property, except for the addition to the description of the words 'interest under contract,' or other appropriate words descriptive of the interest in the property so assessed."

Grumman is not a vendee-in-possession, but the statute does not require that such it be to justify taxation of its interest. Title to the property is in the United States and Grumman is in possession, enjoying full use of the entire property, under a lease giving it an option to purchase at a specified price in the event that the government elects

to terminate the lease and dispose of the property as surplus. The agreement between the parties, after declaring that the "facilities" are not required for public use, placed the property in the possession of Grumman for general industrial purposes, including commercial air operations, at a rent of from $250,000 to $2,800,000 a year; it contained provisions (1) permitting Grumman to sublease, (2) requiring Grumman to expend $1,000,000 for the construction of additional buildings, (3) relating to insurance, with explicit specification that the loss, if any, shall be adjusted with Grumman and the proceeds, at the government's direction, payable to Grumman and (4) granting Grumman the first right to purchase.

We read subdivision 17 of section 4 as it is written, and, when so read, it plainly applies to an occupant such as Grumman, who is in possession of government-owned property under *any "agreement whereby* upon certain payment or payments *the legal title * * * may be acquired* by such [occupant]." The statute contains neither language nor intimation that its application is to be limited to a vendee-in-possession or a holder of the equitable title.

We are dealing, it is important to observe, not with a statute levying a tax—which I recognize is to be construed against the government—but with a claim of exemption from taxation, in which case "it must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption." (*People ex rel. Savings Bank of New London* v. *Coleman*, 135 N. Y. 231, 234.) That is as it should be, reflecting as it does a matter of high policy. An exemption from taxation relieves one class of persons or property from its obligation to bear its share of the expenses of government and throws a correspondingly higher burden upon all other classes, necessarily creating an inequality of taxation. The courts have, therefore, "uniformly refused to favor exemptions, and have

invariably construed statutes freeing property from the burden of enforced contribution to the expense of maintaining the government most rigidly against the claimant, and have declined to countenance such immunity unless the language of the statute is clear and unambiguous, and unless the purpose of the Legislature to exempt such property indisputably appears." (*Matter of Board of Educ., Jamestown* v. *Baker*, 241 App. Div. 574, 575-576, affd. 266 N. Y. 636.)

Certainly, it may not be said that it "indisputably appears" that it was the legislative purpose to exempt from all taxation the real property now being occupied and used by Grumman. On the contrary, the language of subdivision 17 bespeaks an unmistakable intent not to exempt it. In point of fact, were we to uphold Grumman's claim of exemption, we would be placing judicial sanction upon a method of tax avoidance directly opposed to the legislative design so clearly expressed in the statute.

The fact that a lease may be considered personalty, rather than real property, does not in and of itself advance Grumman's position. Quite obviously, a lease which contains a provision giving the tenant an option to purchase would be an "interest in real property." (See e.g., *Gilbert* v. *Van Kleeck*, 284 App. Div. 611, 617, appeal dismissed 308 N. Y. 882; *Sinclair Refining Co.* v. *Clay*, 102 F. Supp. 732, 734, affd. 194 F. 2d 532; *London & South Western Ry. Co.* v. *Gomm*, 20 Ch. D. 562, 581.) And, beyond this, I would but observe that the legislature, fully empowered to classify property for tax purposes in any manner it deems proper (see e.g., *People ex rel. Hudson Riv. Day Line* v. *Franck*, 257 N. Y. 69; opinion of DYE, J., p. 507), has here provided that "The classification of such property or any part thereof as real property for the purposes of taxation under this chapter shall not be affected by any provision of the contract or agreement under which the same is held" (Tax

Law, § 4, subd. 17). To me it seems evident that petitioner, in urging that its "leasehold" is personalty, has overlooked the statute's significant provision that the interest of a corporation in property owned by the United States, of which it has the use, occupation or possession under an agreement whereby it may acquire legal title upon certain payments, "shall be assessed and taxed as real property" (Tax Law, § 4, subd. 17.)

The assessors of the Town of Riverhead acted within constitutional limits in assessing Grumman's interest in the property. The Appellate Division was fully warranted in dismissing the petition and, accordingly, its order should be affirmed.

DESMOND, FROESSEL and VAN VOORHIS, JJ., concur with DYE, J.; FULD, J., dissents in an opinion in which CONWAY, Ch. J., and BURKE, J., concur.

Order of Appellate Division reversed and that of Special Term reinstated, with costs in this court and in the Appellate Division.

Judgment of Court of Appeals in Question

No. 216

COURT OF APPEALS

STATE OF NEW YORK

[SAME TITLE]

BE IT REMEMBERED, That on the 9th day of July in the the year of our Lord one thousand nine hundred and fifty-six,

Grumman Aircraft Engineering Corporation, the appellant—in this cause, came here unto the Court of Appeals, by Cahill, Gordon, Reindel & Ohl, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department.

And The Board of Assessors of the Town of Riverhead, New York, & ano., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Reginald C. Smith, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. John P. Ohl,

of counsel for the appellant—, and by Mr. Reginald C. Smith, of counsel for the respondents, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and that of Special Term reinstated, with costs in this Court and in the Appellate Division.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be reversed &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, March 8, 1957.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[Seal—State of New York, Court of Appeals]

/s/ Raymond J. Cannon
Clerk.

Order of Supreme Court on Court of Appeals Remittitur

COURT OF APPEALS

STATE OF NEW YORK

[SAME TITLE]

The above-named petitioner having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, Second Judicial Department, made herein and entered in the office of the Clerk of the said Appellate Division on the 14th day of May, 1956, which said order reversed an order of the Supreme Court, Suffolk County, herein, at Special Term, which order was duly entered in the office of the Clerk of the County of Suffolk on the 9th day of January, 1956, denying the motion of the respondents to dismiss the petition herein for insufficiency, finding that the assessments are illegal and directing respondents and all tax officials having jurisdiction thereof to strike the assessments from the assessment roll for the year 1955-56, and directed that said motion be granted, and the petitioner, having appealed as aforesaid, from each and every part of said order of reversal as well as from the whole thereof; and the said appeal having been duly argued at the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said order of the Appellate Division of the Supreme Court so appealed from as aforesaid be reversed and that of Special Term reinstated, with costs in the Court of Appeals and in the Appellate Division, and having ordered and adjudged that the proceedings therein be remitted to this Supreme Court there to be proceeded upon according to law;

Now on reading and filing the remittitur from the said Court of Appeals herein, and upon motion of Cahill, Gordon,

Reindel & Ohl, attorneys for the petitioner herein, it is hereby

ORDERED that the said order of the said Court of Appeals be and the same hereby is made the order of this Court; and that the order entered herein on the 9th day of January, 1956, be and the same hereby is affirmed and reinstated, with costs and disbursements of said appeals in the said Appellate Division and in the Court of Appeals to be taxed against the respondents.

Enter.

s/ L. B. HILL
J. S. C.

Granted: March 27, 1957
ALEX JAEGER, Clerk

Filed: March 27, 1957
ALEX JAEGER, Clerk

Order of Court of Appeals Denying Reargument But Amending Remittitur

[Same Title]

A motion for reargument or, in the alternative, to amend the remittitur in the above cause having been heretofore made upon the part of the respondents herein and papers having been submitted thereon and due deliberation having been thereupon had, it is.

Ordered, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

Further Ordered, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is granted. Return of remittitur requested and, when returned, it will be amended by adding thereto the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution and statutes of the United States, to wit: Respondents argued that, under the appropriate provisions of the Constitution of the United States which define the powers of the federal government (Article IV, clause 3; Article I, clause 18 and Article VI, clause 2), the Act of August 5, 1947 (c. 493, § 6, 34 U. S. C. § 522 e) and the contract between appellant and the United States government entered into in pursuance thereof mandated that the property involved herein be made subject to local taxation. This Court held that such taxation was not mandated."

And the Supreme Court, Suffolk County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Gearon Kimball
Deputy Clerk.

(SEAL)

Order of Supreme Court on Amendment of Remittitur

[Same Title]

The above-named Respondents having applied to the Court of Appeals of the State of New York for a reargument of the appeal herein or in the alternative to amend the remittitur in the above cause, and the papers having been submitted, and after due deliberation the Court of Appeals having ordered and adjudged that the motion insofar as it sought reargument was denied, and that the motion insofar as it sought to amend the remittitur was granted, and having ordered and adjudged that the remittitur be amended in the manner specified in the order of said Court, and upon motion of Reginald C. Smith, attorney for the Respondents herein, it is hereby

Ordered, that the said order of the Court of Appeals directing the amendment of the remittitur and bearing date the 12th day of April, 1957 be and the same hereby is made the order of this Court.

Enter,

S. R.
J. S. C.

Granted
Apr. 23, 1957
Alex Jaeger, Clerk

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JUN 21 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. ~~1027~~. 136

THE BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK, *et al.*,

Petitioners,

against

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN P. OHL,
Attorney for Respondent,
63 Wall Street,
New York 5, N. Y.

Of Counsel:
CAHILL, GORDON, REINDEL & OHL.

June 19, 1957

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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 1027

THE BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK, *et al.*,

Petitioners,

against

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This brief is filed on behalf of Grumman Aircraft Engineering Corporation (hereinafter referred to as "Grumman"), the respondent herein, in opposition to the petition of the Board of Assessors of the Town of Riverhead, New York, and the Town of Riverhead (hereinafter referred to as "petitioners"), for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York and the judgment of the Supreme Court of the State of New York, Suffolk County, entered thereon, holding certain local tax assess-

ments against Grumman on the Town Roll to be illegal, erroneous and void for lack of statutory authority in the assessors to assess such property for taxation under the laws of the State of New York.

Question Presented.

The petitioners list five questions claimed to be presented by their application. But the first four of these questions merely rephrase with argumentative matter the one question set out as follows in the order of the New York Court of Appeals entered on petitioners' motion for reargument or for amendment of the remittitur to show that "questions arising under the Constitution and laws of the United States were argued and decided":

> "Respondents [petitioners in this Court] argued that, under the appropriate provisions of the Constitution of the United States which define the powers of the federal government (Article IV, clause 3; Article I, clause 18 and Article VI, clause 2), the Act of August 5, 1947 (c. 493, §6, 34 U. S. C. §522e) and the contract between appellant and the United States government entered into in pursuance thereof mandated that the property involved herein be made subject to local taxation. This Court held that such taxation was not mandated". (Appendix to Petition, p. 59).

The only contention of the petitioners made below and bottomed on a claim of rights conferred upon them by the Constitution and laws of the United States sufficient to validate the local tax assessments involved in this proceeding is that described in the above-quoted order of the New York Court of Appeals. Such contention was first made in the motion by petitioners to reargue the Court of Appeals

decision, which was denied; or for amendment of that Court's remittitur, which was granted.

Grumman submits that the decision of the New York Court of Appeals denying petitioners' contention, as is reflected in the above-quoted order, is the only federal question presented and decided in this case. Rephrasing that same question in four ways is purely argumentative.

The fifth question listed as presented and the excerpts quoted on page 6 of the Petition from Grumman's protest to the local Board of Assessors and from Grumman's petition to the Supreme Court, Suffolk County, New York relate to an alternative contention made *by Grumman* below that if the local assessments in question were deemed authorized by any New York statute, the assessments were *ipso facto* against real estate owned in fee by the United States and were, therefore, illegal because not within the partial waiver of the United States' immunity granted by 34 U. S. C., §522e. If the New York courts had held the assessments authorized under any New York Statute and had proceeded to deny this alternative contention of Grumman, review of such denial by this Court at the instance of Grumman might have been proper. In fact, however, the New York courts sustained the primary contention of Grumman made in Grumman's protest to the Board of Assessors and in its petition to the Supreme Court, Suffolk County, that:

> "The assessments are illegal because they are not authorized by the Tax Law of the State of New York" (R. 43) (Protest).
>
> "That the assessments against this petitioner described in paragraph 6 herein are illegal, erroneous and void and therefore excessive on ground that this petitioner does not have any interest in said real property subject to assessment and tax within the provisions of the Tax Law of the State of New York,

> Article I, Section 4, Subdivision 17, or any other provision of the Tax Law; * * *" (R. 13) (Petition).

The Court of last resort in New York, having found that the New York statutes did not authorize the assessments complained of, also voiced its approval of Grumman's alternative contention. While Grumman submits that the approval by the New York Court of Appeals of its alternative contention was entirely correct, such approval did not constitute under the practice in this Court a decisive determination of a federal question in view of the alternative nature of the point involved which was reached only by way of dictum or alternative holding. Since the New York Court of Appeals first held that the New York law did not authorize the petitioners to make the assessments, all else that was said was dictum. As a matter of long-settled practice, this Court regularly declines to review decisions of State courts decided on a State law ground adequate to support the decision even though a federal question was involved in an alternative holding in the State courts.

A clearer case for application of this well-settled rule is difficult to conceive. The New York Court of Appeals has held that the New York statutes do not authorize assessment of a particular item of property for taxation by a local government of the State of New York. This is plainly a State court decision adequately grounded on a State law determination. The federal point under discussion is reached only by way of a statement that "even if" the assessment were authorized by the State law, it would be illegal because made in disregard of State law dictates as to valuation or invalid because going beyond the limited waiver of immunity granted by federal law. The remarks of the Court below on this federal point are plainly by

way of dictum or, at most, made in respect of a subsidiary portion of an alternative holding.

Grumman submits that the fifth question alleged to be presented should not be considered here because the result reached below is supported by an adequate State ground; and that the sole question presented is therefore that set out in the above-quoted order of the New York Court of Appeals amending the remittitur.

Statement of the Case.

Throughout the Petition herein and particularly in petitioners' Statement of the Case, there is present an implication that the New York Court of Appeals considered and decided a claim of Grumman that its interest sought to be assessed was exempt from taxation by the State of New York. This simply is not so. Rather, the Court considered (1) that the fee simple ownership of the property by the United States was exempted by State law from taxation by the Town; and (2) that the interest of Grumman in the property under its lease thereof was not taxable by the Town under the laws of New York because (a) such interest did not constitute "real property"—the only type of property taxable by New York local governments under Section 3 of the New York Tax Law (Appendix to Petition, p. 27), and (b) the rights of Grumman in respect of the property were not such as to authorize the assessments under Section 4(17) of the New York Tax Law, which permits taxation of Government-owned real property occupied by private persons under certain specified circumstances (Appendix to Petition, pp. 28-29). The dissenting judges in the New York Court of Appeals disagreed with the majority holding on the last

mentioned point as to the construction of Section 4(17) of the New York Tax Law—clearly a question of State law.

The Statement of the Case in the petition omits the primary contention of Grumman, sustained below, that the assessment for taxation of its interest in the property was not authorized by New York law. The Statement also fails to point out the limited nature of the single federal question found by the Court of Appeals to have been considered and decided, and fails to indicate the highly conditional nature of Grumman's right of first refusal contained in its lease. The portion of the Statement to the effect that the assessors deemed the interest of Grumman as severed for tax purposes from exempt Government ownership and the characterization of Grumman's interest as "fractional" find no support in the Record. The Statement also seeks to explain the use of language in the assessments clearly showing the intention of the assessors to proceed under the claimed authority of Section 4(17) of the New York Tax Law (which is not an exempting provision but one authorizing taxation of real property owned by the United States when occupied by private persons under specified circumstances) by implying that the use of such language was required even if the assessors were not purporting to proceed under Section 4(17). Grumman submits that there is no such requirement.

Furthermore, the statement fails to indicate that the consideration below of the applicability and effect of the decision of this Court in *United States* v. *County of Allegheny*, 322 U. S. 174 (1944) related to Grumman's above-described secondary or alternative contention that the assessments would be illegal as a matter of federal law, even if the New York law had been found to authorize them, which it did not.

Under the circumstances, Grumman respectfully refers the Court to the opening paragraphs of the opinion of the New York Court of Appeals (Appendix to Petition, pp. 41-45), for a Statement of the Case for the purposes of this proceeding.

ARGUMENT.

I.

The decision below correctly holds the federal statute to be permissive. No mandatory invasion of the power of the New York State Legislature to delimit the objects of taxation by New York local governments was intended. No federal question of substance is presented.

The criteria applicable to determinations as to whether or not the judgment of a State court shall be reviewed by this Court, set forth in Rule 19(1)(a) of this Court, indicate clearly that the federal question decided by the State court must be one of substance.

The question which petitioners now seek to bring to this Court, having raised the point for the first time in a motion to reargue the case or for amendment of the remittitur following the decision of the New York Court of Appeals, is the question of whether or not a federal statute, 34 U. S. C. §522c, mandated that the interest of Grumman under a lease of Government-owned property made pursuant to 34 U. S. C. §522a be taxable by the Town of Riverhead, New York, and created in the Town a federal right and privilege to impose taxes thereon, despite the fact that the New York statutes have been held by the highest court in the State

not to authorize such taxation by the Town. The federal statute provides, in relevant part, as follows:

> "The lessee's interest, made or created pursuant to the provisions of sections 522a-522c and 522e of this title, shall be made subject to State or local taxation." 34 U. S. C. §522e, 61 Stat. 775 (1947).

The Court below held, and we submit properly so, that this federal statute was permissive, rather than mandatory. It is important to note that the judges of the New York Court of Appeals were unanimous in this conclusion. Thus, the majority opinion states:

> "The Federal statute is, however, *permissive* only and no tax is possible unless local law authorizes and provides for it." (Emphasis supplied) (Appendix to Petition, p. 48)

The dissenting opinion states:

> "The sole question presented, therefore, is whether the Tax Law of this state provides for the assessment and taxation of Grumman's interest * * *." (Appendix to Petition, p. 51)

Petitioners seek to characterize the decision of the New York Court of Appeals as to the proper construction of this statute as depriving the Town of a federal right to tax the interest of Grumman, irrespective of the extent of the taxing powers of the Town under the law of the State; and apparently take the position that the New York Tax Law, if construed as not authorizing taxation of Grumman's interest by the Town, is invalid as repugnant to the Constitution and laws of the United States. Acceptance of this proposition would be novel doctrine indeed, requiring, as it would, the creation by this Court of New York law authorizing the Town to impose the tax.

In any event, the position of the New York Court of Appeals as to the proper construction of the statute as permissive, not mandatory, is submitted to be clearly correct on the basis of a mere reading thereof, as well as on the basis of the authorities hereinafter cited on the point. And, it seems entirely clear to Grumman, incorporation of the statutory language in the lease document cannot add to or vary the meaning and effect thereof although petitioners appear to make some contention otherwise. (Petition, pp. 12-14).

Even without consideration of the Constitutional inhibitions on the power of Congress to interfere in the internal affairs of the States, it is entirely clear from the legislative history that Congress in enacting 34 U. S. C. §522e intended to and did no more than to *permit* State or local taxation of a lessee's interest under a lease of United States property made under the authority of the statute, if and to the extent that the applicable State law authorized such taxation.

Senator Baldwin, who was in charge of the bill which became the law under discussion, explained to the United States Senate when the bill was up for passage that:

> "Section 6 [which became 34 U. S. C. §522e] expressly provides that the lessee's interest in property leased under the bill *may* be the subject of taxation by State or local authorities." 93 Cong. Rec., 9798 (80th Cong., 1st Sess., July 23, 1947). (Emphasis supplied.)

Such Congressional intention is further borne out by the 1956 reenactment of Section 522e, as noted in the opinion of the New York Court of Appeals (Appendix to Petition, p. 44), to provide that:

> "The interest of a lessee of property leased under this section *may* be taxed by State or local governments." 10 U. S. C. §2667 (e), 70A Stat. 150 (1956). (Emphasis supplied.)

This clearly permissive language is declaratory of the prior law. SENATE REPORT No. 2484, 84th Cong., 2d Sess., Part III, Par. 5 (July 9, 1956), p. 19.

These evidences of legislative intention unmistakably show that 34 U. S. C. §522e is a partial waiver of immunity, not a Congressional effort to interfere in the internal affairs of the States.

Indeed, Congress by the very language used in §522e shows that it left to each State the decision as to whether or not the interests of lessees under leases authorized by the federal statute should be taxed by the State itself or by its local political subdivisions. The phrase used was "State *or* local taxation." Congress, by the use of the disjunctive, clearly recognized the right of each State to allocate permissible objects of taxation among its various governmental units. The precise terminology of the federal statute thus provides a clear indication that the power of a local political subdivision to tax such interests raises only a State law question.

And the permissive nature of the Federal statute is further shown by the fact that, at its 1956 session, the New York Legislature passed a bill (A. I. 2178, Pr. 4215) amending the New York Tax Law to authorize taxation of Grumman's interest under its lease. This bill was vetoed by the Governor, the veto message reading in part as follows:

> "The present law authorizes localities to impose a real estate tax, at the full value of the property, on the person who is in use, occupation, or possession

of real property, even though the title to such property is in the United States or the State of New York.

"This bill seeks to amend the law so as to enable the Town of Riverhead to tax 4,500 acres of land owned by the United States Navy, but occupied and used by the Grumman Engineering Corporation. The changes imposed by this bill, however, go beyond such intention. One of the amendments provides that the assessment of the real property shall no longer be at the full value of such property, but on the value of the interest in the property. This particular change would lead, in my opinion, to considerable dispute because it is so indefinite. * * *" New York State Legislative Annual (1956) p. 544.

Accordingly, it is unnecessary to consider the obstacles (which are, in Grumman's view, insurmountable) to the requested determination that the powers of Congress in respect of disposition of Government property provided in Article 4, §3, Clause 2, its incidental powers under Article 1, §8, Clause 18 and the rule of Article 6, Clause 2 of the Constitution would authorize the Congressional action which petitioners seek to read into 34 U. S. C. §522e, in the face of the Tenth Amendment to the Constitution and the freedom of the States from federal control over or interference with the system of property taxation adopted by each State for itself and its creatures, the local governments.

As would be expected, the Courts have considered that State-law authorization to tax is a *sine qua non* of local taxation of the lessee's interest under a lease of United States property.

In *Squantum Gardens, Inc.* v. *Assessors of Quincy*, 140 N. E. 2d 482 (Mass. Feb. 11, 1957) (not yet officially reported), the Massachusetts Supreme Judicial Court, in holding that the Massachusetts statutes there relied upon

did not authorize local taxation of the interest of a lessee of United States property, said:

> "2. The propriety of the final decree [enjoining the attempted taxation] must be determined on the basis of analysis of (a) the applicable acts of the Congress authorizing taxation, by the States and their subdivisions, of property owned by the United States and leased to private corporations and individuals; (b) *the Massachusetts statutes authorizing assessment of real estate taxes;* and (c) the administrative action taken by the assessors in assessing the taxes here in issue.
>
> * * * *
>
> "Compliance with the Congressional permission thus has two aspects. It means both (1) that the State tax statute must authorize a tax of the character permitted by the Congress, and (2) that the administrative action of assessment and collection must comply with the Congressional and State statutory authorization." (p. 485) (Emphasis supplied)

And in *Fort Dix Apartments Corp.* v. *Borough of Wrightstown,* 225 F. 2d 473 (3d Cir. 1955), *cert. denied,* 351 U. S. 962 (1956), a case sustaining local New Jersey taxation of a lessee's interest in United States property and referred to with approval by this Court in *Offutt Housing Co.* v. *County of Sarpy,* 351 U. S. 253, 258-59 (1956), the Court said:

> "Beyond congressional permission to tax, it is also necessary to the validity of the local taxes here that, pursuant to such permission, the state have granted the municipalities the power to levy the tax in question." (p. 476)

It should also be noted that petitioners' assertion that Grumman pays a lower rental than it otherwise would

because the Government fixed Grumman's rental at a smaller amount to allow for Grumman's liability to local taxation of its interest under the lease, and the assertion or implication that the United States makes payment to the Town in lieu of taxes on Grumman's interest in the property (Petition, p. 11) are absolutely without foundation in the Record.

II.

The Court below decided the federal question involved in accord with applicable decisions of this Court.

The petition asserts that the New York Court of Appeals has misinterpreted and misapplied this Court's decision in *United States* v. *County of Allegheny*, 322 U. S. 174 (1944), and that the decision of the New York Court of Appeals is not in accord with applicable decisions of this Court. (Petition, pp. 9, 13)

As respects the *County of Allegheny* case, it is important to note that the Court below did not refer to that case in reaching its decision on the proper interpretation and effect of 34 U. S. C. §522e, the only federal question decided below. The *Allegheny* case was referred to only in connection with Grumman's secondary and alternative contention that the assessments were illegal under federal law if found authorized by State law. It is submitted that the Court below correctly applied the decision of this Court in the *Allegheny* case in approving Grumman's alternative contention, but it is further pointed out that even if such were not the case, any possible misapplication of the *Allegheny* case would be in respect of a dictum or, at most, a subsidiary portion of an alternative holding,

review of which would be futile (as well as at variance with the long-settled practice of this Court), since the *decision* of the Court below was adequately grounded on a determination of State law.

Except for *Offutt Housing Co.* v. *County of Sarpy*, 351 U. S. 253 (1956), discussed *infra*, the cases in this Court cited by petitioners in support of their claim that the New York Court of Appeals decision on the federal question herein is not in accordance with applicable decisions of this Court have nothing to do with 34 U. S. C. §522e, the federal statute involved. Most of the cited decisions, in Grumman's view, are entirely unrelated to the question sought to be raised by the petitioners in this application. They involve, rather,

(1) Construction of a North Carolina statute granting lands to a private individual as immediately effective, despite use of the future tense in the statutory language. *Rutherford* v. *Greene*, 2 Wheat (15 U. S.) 196 (1817)

(2) The power of Congress with respect to grants of and claims for public lands. *United States* v. *San Francisco*, 310 U. S. 16 (1940) (power to grant public lands to city on condition that electric power generated by use of the granted lands not be distributed by private utilities); *United States* v. *California*, 332 U. S. 19 (1947) (power to forego claim to tidelands); *United States* v. *Gratiot*, 14 Peters (39 U. S.) 526 (1840) (power to authorize lease of Government property); *Ruddy* v. *Rossi*, 248 U. S. 104 (1918) (power to exempt public lands from liability for debts of homesteader contracted prior to issuance of patent therefor); *Light* v. *United States*, 220 U. S. 523 (1911) (power to prevent grazing of cattle on public domain).

(3) Effect of grants of public land (not taxing powers) to local governments by Congress. *Jones* v. *Soulard*,

24 How. (65 U. S.) 41 (1860) (inclusion of accretions in grant bounded by river); *Kissell* v. *St. Louis Public Schools*, 18 How. (59 U. S.) 19 (1855) (lands granted for school purposes not subject to preemption).

(4) General construction of statutes to admit all parts of them to stand, if possible. *Heydenfeldt* v. *Daney Gold and Silver Mining Co.*, 93 U. S. 634 (1876) (construction of Nevada Enabling Act).

(5) Lack of power in the State to interfere with Congressional power to dispose of federal property. *Gibson* v. *Chouteau*, 13 Wall. (80 U. S.) 92 (1871) (possession of public lands before issuance of patent for period of State statute of limitations does not control title subsequently conveyed by patent).

(6) "Liberal" rules of construction applicable to the Miller Act and its predecessor requiring filing of bonds by Government contractors for the benefit of suppliers. *Brogan* v. *National Surety Co.*, 246 U. S. 257 (1918) (groceries supplied to a contractor and consumed by laborers held materials supplied and used in prosecution of public work); *Standard Accident Insurance Co.* v. *United States*, 302 U. S. 442 (1938) (railroad furnishing transportation of materials for structure held to have furnished labor or materials used in construction of a public building); *MacEvoy Co.* v. *United States*, 322 U. S. 102 (1944) (bond does not protect supplier of materials to a materialman of a Government contractor); *Fleischmann Construction Co.* v. *United States*, 270 U. S. 349 (1926) (determination of period of limitations in respect of suits on bond); *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 916 (1903) (effect of extension of time on surety's obligation under bond).

(7) Construction of statute validating a land patent. *McCarthy* v. *Mann*, 19 Wall. (86 U. S.) 20 (1873).

(8) Power of this Court finally to determine the meaning and effect of contracts to which the United States is a party. *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558 (1946) (State may tax vendee-in-possession of Government-owned land).

(9) Supremacy of federal law over conflicting State law. *Case* v. *Bowles*, 327 U. S. 92, 102 (1946) (applicability of Emergency Price Control Act to State sales).

A few of the cited decisions of this Court deal with immunity of federal property and transactions from State taxation. These decisions, to the extent relevant to the issue in this proceeding, support the decision below in that in each such case State-law authority existed for imposition of the disputed tax and the problem dealt with by this Court was the existence and extent of any waiver of federal immunity. These cases involved:

(1) Existence and extent of federal waiver of immunity as respects taxation of the interest of a lessee of federally-owned Wherry Act housing. *Offutt Housing Co.* v. *County of Sarpy*, 351 U. S. 253 (1956). This Court was careful to point out, in affirming a decision of the Nebraska Supreme Court sustaining Nebraska taxation of the lessee's interest, that the Nebraska Attorney General had ruled that such interest was taxable as personal property under the Nebraska law.

(2) Construction of federal statute providing that "no lands granted to any railroad corporation by any Act of Congress shall be exempt from taxation by States, Territories and municipal corporations on account of the lien of the United States upon the same" for certain costs, with provisos which, among other things preserved the lien as against the purchaser of any such lands sold for taxes. *Central Pacific R. R.* v. *Nevada*, 162 U. S. 512 (1896). In

this case, the Supreme Court of Nevada had held that certain lands granted to the railroad were taxable but that others were not. This Court affirmed the decision below. The statement of the case contains the following sentence:

> "The State being bound by the decision of its Supreme Court that the 195,200 acres of unsurveyed lands were not taxable, was not entitled, and did not attempt to sue out a writ of error." (p. 514)

In the course of its opinion this Court said:

> "It does explicitly appear that authority was given by Congress to the States to tax these lands; but whether, under the state laws, the railroad had any taxable interest therein, or whether the decision of the court that it had no such interest in the unsurveyed lands is consistent with its opinion that it had such interest in the surveyed lands, is immaterial, so long as no Federal right was denied to it. * * *" (p. 523)

(3) Applicability of State franchise and unemployment taxes to private operators of bath houses on a federal reservation. *Superior Bath House Co.* v. *McCarroll*, 312 U. S. 176 (1941) (federal consent to taxation construed to include franchise tax); *Buckstaff Bath House Co.* v. *McKinley*, 308 U. S. 358 (1939) (implied Congressional consent to unemployment tax found).

(4) Unconstitutionality of Arkansas Gross Receipts tax as applied to purchase in Arkansas of tractors for the Government. *Kern-Limerick Inc.* v. *Scurlock*, 347 U. S. 110 (1954).

(5) Unconstitutionality of State taxation of personal property owned by the United States and bailed to a private person, in the absence of a waiver of federal immunity. *United States* v. *County of Allegheny*, 322 U. S. 174 (1944).

Finally, in reaching its conclusion that the New York Tax Law does not authorize the assessments involved in this proceeding, the New York Court of Appeals applied the New York rule that a taxing statute is to be construed against the taxing authority. Petitioners' efforts to seek review in this Court of this State court determination on a question of a rule of construction of a State statute should be wholly unavailing.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 19, 1957.

Office - Supreme Court, U.S.
FILED
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1957

No. 136

THE BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK, and THE TOWN OF RIVERHEAD (parts by operation of law)

Petitioners

against

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

Respondent

PETITION OF PETITIONERS FOR REHEARING

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IN THE

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No. 136

THE BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK, and THE TOWN OF RIVERHEAD, a party by operation of law,

Petitioners,

against

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,

Respondent.

PETITION OF PETITIONERS FOR REHEARING

Petitioners, The Board of Assessors of the Town of Riverhead, and The Town of Riverhead respectfully petition for rehearing in the above entitled matter.

Statement

Petitioners seek a writ of certiorari to review a New York State court judgment ordering to be stricken from Petitioners' assessment roll as illegal and void assessments of taxes on Respondent's lessee interest made and created pursuant to the provisions of the Act of August 5, 1947, 34 U. S. C. secs. 522a-522e.

The State Court proceeding arose by petition filed by Respondent in the New York Supreme Court, Suffolk County, to strike the assessments as illegal and void, and by Petitioners (respondents below) moving to dismiss Respondent's petition as failing to state facts sufficient to

warrant relief. The New York Supreme Court at Special Term denied Petitioners' motion to dismiss and granted Respondent judgment sustaining its petition and holding the assessments illegal, erroneous and void, and ordering them stricken from the assessment roll (R. 60).

Your petitioners appealed to the Appellate Division, Second Department; and that Court reversed four to one (R. 78-79; Appendix to Petition, pp. 39-40).

Respondent then appealed to the Court of Appeals of the State of New York; and that Court reversed four to three and reinstated the Special Term judgment (Appendix to Petition, p. 54). On motion by Petitioners for reargument or in the alternative to amend the remittitur, the Court of Appeals denied the motion for reargument, but granted the motion to amend the remittitur and certified as presented and passed upon a question under the Constitution and statutes of the United States and worded in the Court's own language.

Petitioners filed timely petition for certiorari, which this Court denied by order of October 14, 1957. Petitioners now petition for hearing under Rule 58, par. 2.

Grounds for Rehearing

1. This is a case in which Federal and State laws are so interwoven that the *State* law can not be an independent subject matter of interpretation or decision in the case unaffected by the *Federal* law (cf. *Abie State Bank* v. *Bryan*, 1931, 282 U. S. 765, 773). It is a case wherein it cannot be said that the New York Court's interpretation of *New York* law was wholly free from an erroneous interpretation of *Federal* law and of this Court's decision in the *United States* v. *County of Allegheny*, 1944, 322 U. S. 174, 190-191 case (cf. *Rayonier Inc.* v. *United States*, 1957, 352 U. S. 315, 320), or of the rights and obligations of Respondent and beneficial rights of Petitioners under Respondent's Federal contract.

It is a case, moreover, in which, because the *State* law interpreted with the *Federal* is peculiar to the State of New York, litigation elsewhere so as to produce a resulting direct conflict with the decision of the New York Court of Appeals is either impossible or highly improbable; and this is reason for granting rehearing of the petition for certiorari (cf. *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50, wherein first certiorari had been denied, 303 U. S. 639; then rehearing had been denied, 303 U. S. 667; but later motion for leave to file a second petition for rehearing was granted and certiorari granted, 304 U. S. 587; and see also *Muncie Gear Co.* v. *Outboard Co.*, 1942, 315 U. S. 759, 766).

That such as a ground for rehearing is not confined to patent cases such as the *Schriber* and *Muncie Gear* cases is clear from this Court's citing the *Schriber* case in Rule 58, par. 2, when it amended the Rule, then Rule 33, on October 13, 1947 (332 U. S. 858), to illustrate instead its present broad specification of "other substantial grounds available to petitioner although not previously presented" (Rule 58, par. 2).

2. The conflict *in* the New York Court of Appeals, and among the lower State court justices—i.e., with the Court of Appeals divided 4—3, in reversing the divided 4—1 Appellate Division decision, which had reversed Special Term, and with the total of 13 State court justices and judges thus having divided 7 *for* and 6 against your Petitioner—shows more than would a decision from another jurisdiction involving another State's differing statutes the "doubtful validity" of the Court of Appeals decision (cf. *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, *supra*, 305 U. S. 47, 50) under and as respecting the Federal statute (34 U. S. C. sec. 522e) Federal contract and Federal decision (*United States* v. *County of Allegheny*, *supra*) affecting the New York law. Compare *Ragonier Inc.* v. *United States*, *supra*, 352 U. S. 315, 320, where this Court said that "we cannot say that Court's interpretation of

Washington law was wholly free from its erroneous acceptance of the statements in *Dalehite*", decided by this Court.

3. Long before enactment of the Act of August 5, 1947 (34 U. S. C. sec. 522e) the New York statute had provided for many years, in New York Tax Law, 59 McKinney's Consol. Laws of New York, Part I, sec. 3 that:

> "All real property within the State is taxable *unless exempt from taxation by law*" (Italics ours)

and in sec. 4 that:

> "The following property shall be exempt from taxation:
>
> 1. Property of the United States *except property subject to taxation under the Constitution and laws of the United States*". (Italics ours)

Thus, long in advance of the Congressional Act of August 5, 1947, New York thus had statutorily recognized and had built its laws upon the authority of the United States to *make* government property "subject to taxation under the Constitution and laws of the United States". If State authorization were needed, this constituted authorization by the State of New York for the Congress to *make* the property or any part thereof or interest therein "subject to taxation under the Constitution and laws of the United States", and therefore taxable by Petitioners, when made subject thereto by the United States.

The Act of August 5, 1947, 34 U. S. C. secs. 522a and 522e, reads as though designed to be interwoven directly with these already existing New York provisions, in providing in sec. 522a for the future making of leases deemed "advantageous to the Government" or "in the public interest", and in further providing, in sec. 522e, as respects each leasehold authorized to be made, that:

> "The lessee's interest, *made or created pursuant to* the provisions of sections 522a 522c and 522e of this title, shall be *made* subject to State *or local* taxation". (Italics ours)

Both statutes use the words "subject to" taxation by local governments, and use the concept of this being controlled by Congress. By precisely the same words "subject to", the State Act first surrendered control to Congress, and Congress then exercised the same so that the "lessee's interest", as soon as "made", is "made subject to . . . local taxation".

The *Report on Federal Contributions to States and Local Governmental Units With Respect to Federally Owned Real Estate*, House Document No. 216, 78th Congress, 1st Session, submitted in 1943, four years after appointment of the Federal Real Estate Board by Executive Order No. 8034, had emphasized repeatedly differences between State and "local" tax losses and problems, and the necessity of providing directly for the latter. The Report states (pp. 17-18):

> "In practically all cases, the sites for the establishment of these war projects have been suddenly and unexpectedly removed from the *existing tax structure of the local communities* and their removal results in a direct loss of tax revenue. . . .
>
> ". . . Over a period of years, *local* governments can be expected to adjust to Federal ownership of those recent acquisitions which are retained. Temporarily, however, there is a valid distinction and a case for special treatment.
>
> "The recent acquisitions have occurred abruptly; they have seriously affected the tax base of many *local* governments; and no one knows now which parcels will be retained and which will be transferred to other uses after the war. Some arrangements seem, therefore, to be desirable to tide *local governments* over the transitional period, enabling *them* to continue *their* necessary services without disruption and to meet *their* financial obligations without excessive burdens upon *their* remaining taxpayers." (Italics ours.)

In some cases:

> "A direct payment is made *to the counties* equal to the *county portion* of the former property tax as defined above" (p. 35).

Congress, therefore, intended full effectiveness for the words "shall be made subject to State *or local* taxation" in the Act of August 5, 1947, 34 U. S. C. sec. 522e, and consequently in Respondent's Federal contract.

Congress could, of course, have made the whole property locally taxable; and it is not disputed that had it done so, secs. 3 and 4 of the New York statute read together with such a Federal statute would effectively empower Petitioners to assess the tax. In such case Respondent would pay its part of the tax in the rent it paid. But it was for the United States to determine what should be advantageous to the Government or in the public interest, and what part of the whole should be "subject to taxation under the Constitution and laws of the United States". The whole comprehends the parts, and the part represented by the "lessee's interest" represented, because it was "made or created" as a severed interest, a part of the real property of the United States, made subject to its local taxation. For such reason Respondent pays less rent than would be the case if its lessee interest had not been made subject to tax.

4. The reasoning of the Court of Appeals majority is as though the State, in order to consent to the Town taxing, had to act *after* Congress acted; whereas both the State and Federal statutes evidence the contrary, and evidence that Congress and the Government contracting official, in in contracting unqualifiedly the amount of rent to be received from Respondent, acted in recognition of an obligation of Respondent to pay taxes locally to Petitioners on the "lessee's interest". Instead of the State withholding and Congress and the Federal contracting official recognizing a State veto or complementary power, to be exercised

only by later State statute, the State had previously recognized and Congress and the Federal contracting official then exercised a power, unimpeded by the State, to make the "lessee's interest" of Respondent subject to local taxation by Petitioners.

5. Moreover, "The power was called into action" by the making of the contract by Respondent; thereby Respondent "put the act into operation, and voluntarily subjected themselves to its provisions"; and there is applicable the principle that "The constitutional right against unjust taxation is given for the protection of private property, and may be waived by those affected who consent to such action to their property as would otherwise be invalid" (cf. *Wight* v. *Davidson*, 1901, 181 U. S. 371, 377). Respondent accepted its contract expressly subject to local taxation of its "lessee's interest", thereby consenting to local taxation thereof by Petitioners. This was for benefit of the "local" government.

6. Respondent, moreover, is not a mere general taxpayer, as to whom the sole "consideration" for its tax liability is local government protection of citizens and residents, but is one "specially and peculiarly benefited" by its Government contract, as a special consideration for its obligation to pay the Petitioners a tax (cf. *Illinois Central Railroad* v. *Decatur*, 1893, 147 U. S. 190, 198-199). Consequently, this is special reason why the principles of construction to be applied require strict construction *against the Respondent*, and resolution of all doubts *in favor of the Town* (cf. *Illinois Central Railroad* v. *Decatur*, *supra*; *Ford* v. *Delta & Pine Land Co.*, 1897, 164 U. S. 662; *Durham Pub. Service Co.* v. *City of Durham*, 261 U. S. 149; *Cleveland El. Ry. Co.* v. *Cleveland*, 204 U. S. 116).

A principal difference between the reasoning of the majority of four and minority of three in the Court of Appeals and between Petitioners' and Respondent's contentions is the application by the majority and argument by Respondent of *strict* construction *against* the Town, and by

the minority and by Petitioners of a *liberal* construction *in favor* of the Town. This is a matter not merely of State law and State interest, but of Federal law and national interest and importance and should be reviewed and determined by this Court.

Wherefore, Petitioners respectfully pray that a rehearing be granted herein, and that a writ of certiorari be granted as prayed for.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58, par. 2.

REGINALD C. SMITH,
Counsel for Petitioners.